SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 199

EARL R. DEEN, PETITIONER,

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

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[fols. 1-2] **IN THE DISTRICT COURT OF BROWN COUNTY, TEXAS.**

No. 12,110

EARL R. DEEN

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY

FIRST AMENDED ORIGINAL PETITION—Filed February 17, 1954

To the Honorable Judge of Said Court:

Now comes Earl R. Deen, hereinafter called Plaintiff, complaining of Gulf, Colorado and Santa Fe Railway Company, a corporation hereinafter called Defendant, and Plaintiff files this, his First Amended Original Petition, and with respect would show the Court as follows, to-wit:

I.

That Defendant is duly and legally incorporated under the laws of the State of Texas, having and maintaining an office and principal place of business at Galveston, Texas, and service of process upon said Defendant has already been obtained. That at all times pertinent to this cause of action and material thereto, Defendant corporation was and is engaged in the business of a common carrier, by railroad, in interstate commerce.

II.

Plaintiff would further show the court that at all times material to this cause of action, Defendant corporation was a common carrier engaged in interstate commerce, and that Plaintiff was an employee of Defendant corporation and was engaged as an employee in interstate commerce, and that the injuries complained of arose in the course of, and while Plaintiff and Defendant corporation were engaged in the conduct of such interstate commerce.

[fol. 3] III.

That this cause of action is brought under and by virtue of the Federal Employers Liability Act, jurisdiction having been conferred upon this Honorable Court by Section 24, paragraph 1 of said Act.

IV.

Plaintiff would further show the court that on or about the 12th day of July, 1949, at approximately 10:10 A. M., he was employed by the Defendant Corporation as a coppersmith, working in the Defendant corporation's roundhouse at its yard shops at Brownwood, Brown County, Texas, and in such position service- Defendant's interstate railroad trains and engines, which were engaged in interstate commerce, and passed through Brownwood, Brown County, Texas. That at all times pertinent hereto, the Plaintiff was acting in the regular course of his employment and within the scope of his duties as a coppersmith. That the Defendant kept at said roundhouse and for the use of this Plaintiff in carrying out his duties as a coppersmith a babbitt melting pot, and that said melting pot then in use had burst and was no longer useable. That somet ime prior to the occur-*ance* in question, the exact time being unknown to this Plaintiff, but well known to the Defendant, the Defendant ordered a new melting pot to replace the broken one. That on the morning of the accident in question, and prior to the happening thereof, the Plaintiff's foreman, to-wit: O. W. Williams, advised the Plaintiff that there was no engine in the roundhouse which had to be finished that day. That at about 9:30 A. M. on said date, the Defendant's store [fol. 4] department clerk, W. J. Bettis, advised this Plaintiff that the new babbitt melting pot was on its way to the roundhouse from the depot. That the engine which it was necessary to be gotten out that day could not be finished as ordered by Plaintiff's said foreman if there was any delay in the installation of the new melting pot, and in addition thereto, it was Plaintiff's duty to remo*be* said old melting pot from the furnace and to remove the babbitt therefrom. That the removal of such old melting pot

from the furnace and the removal of the babbitt therefrom was a necessary duty of the Plaintiff in order to repair the engine which had been ordered to be completed on that date. That thereupon, the Plaintiff proceeded to remove said old melting pot from the furnace to the floor adjacent to such furnace. That said melting pot weighed between two hundred and three hundred pounds and contained several hundred pounds of cold and solidified babbitt. That in order to remove said babbitt from said pot, it was necessary to turn the pot upside down in order that said babbitt could fall therefrom. That the Defendant knew, or by the use of reasonable diligence should have known, that the old pot had to be removed and the babbitt taken therefrom. That by virtue of such knowledge, the duty rested upon the Defendant through Plaintiff's foreman to have available to Plaintiff proper tools with which to remove the babbitt from said old pot, or in the alternative sufficient help to remove such babbitt without the use of tools, and further that the duty rested upon the store department of the Defendant to notify Plaintiff's said foreman that the new pot was being delivered for installation. That in order to carry out his duties and in [fol. 5] order to carry out the instructions of his said foreman in order that said engine could be repaired, the Plaintiff thereupon attempted to turn said pot over and to remove the babbitt therefrom by hand. That because of the wright of said pot, together with the babbitt therein contained, the Plaintiff was unable to turn said pot over. That because of the tremendous weight of said melting pot, the Plaintiff immediately ascertained that the same could not be cleared of the babbitt contained therein unless he had adequate tools to grasp said pot and give the Plaintiff sufficient leverage to turn the pot over, or in the alternative that he have sufficient help to tip the edge of said pot over and turn the same in the direction away from the Plaintiff. That the Defendant having negligently failed to furnish such proper tools as above set forth, the Plaintiff then procured the help of one Earl Snow to turn said pot over and dump the babbitt out. That the said Plaintiff and the said Snow attempted to turn said pot over by lifting the edge of the same and turning it away from

them, but that the same could not be done because of the tremendous weight thereof. That because of the lack of sufficient help of sufficient tools, it then became necessary for the plaintiff and the said Snow to grasp said pot upon its edge and pull the same towards them in order to turn the same over, and that in so doing, the babbitt fell out of said pot as the same was being turned over, striking the Plaintiff's leg about four inches above the right angle. That had the Plaintiff had sufficient help, to-wit, at least two other persons, to assist in turning said pot over, the [fol. 6] same could have been done by lifting the same and turning it over away from the said Plaintiff and the said Snow, but because of the negligence of the Defendant in failing to furnish sufficient help or sufficient tools to accomplish said purpose, the injuries herein set forth were received by this Plaintiff. In connection with said help, Plaintiff would further show the court that he was entitled to have a helper, but that the Defendant failed and refused to furnish such helper, even though he had requested his said foreman on the morning of and prior to said accident to furnish him with such helper and was advised by said foreman that he would just have to get along the best he could. That the injuries herein set forth resulting to the Plaintiff were the direct and proximate result, jointly and severally, of the negligent acts of the Defendant in the following respects:

A. That the Defendant was negligent in not notifying Plaintiff's foreman that the new melting pot was being sent to the roundhouse for installation, in order that said foreman would have had proper tools as herein described for the removing of said babbitt, or in the alternative having sufficient help, as herein mentioned, to remove said babbitt without the use of tools.

B. That the Defendant was negligent in not having the foreman present and proper supervision.

C. That the Defendant was negligent in not furnishing Plaintiff with proper tools, as herein described, to remove said babitt.

[fol. 7] D. That Defendant was negligent in not furnishing at least two additional men to assist Plaintiff in removing the babbitt from said pot.

V.

That as a result of the negligence of the Defendant as hereinabove set forth, the Plaintiff's right leg was injured in that the Plaintiff's right tibia was fractured over the junction of the middle and one-third of the tibia; that because of said injury Plaintiff was hospitalized for approximately two weeks overall and in a cast five months, and that as a direct and proximate result of said injury, Plaintiff is permanently and partially disabled, suffering poor circulation and numbness in the inner side of the foot, ankle and in the arch, with a marked amount of pain in the longitudinal arch of his right foot, giving him severe pain, with paid radiating in his toes, and with continued swelling in the lower extremities; that as a direct and proximate result of said injuries negligently inflicted by the Defendant, Plaintiff will suffer for the rest of his life pain and suffering and permanent partial disability of approximately thirty per cent, and not since the said injury has Plaintiff been free from conscious pain and suffering, and upon information and belief, alleges that such pain and suffering will extend throughout his natural life.

VI.

That at the time of said injuries aforesaid, which were negligently instigated upon him by Defendant, as hereinabove set forth, and prior thereto, he was a strong, able-bodied man, thirty-six years of age, earning and capable of earning a sum of money in excess of $325.00 per month. [fol. 8] That as a result of said injuries aforesaid, his capacity to work and labor immediately diminished, and Plaintiff alleges that such total incapacity will last throughout his lifetime.

VII.

Should Plaintiff be mistaken in the extent and duration of the disabilities caused by said injuries, then in the alternative he says that said injuries have materially impaired his earning capacity and greatly reduced the same, and that such impairment and reduction of earning capacity is permanent and will last throughout his natural life. That as a result of said injuries, loss of earning capacity, loss

of future earning capacity, pain and suffering endured in the past, and pain and suffering to be endured in the future, all of which was negligently instigated upon Plaintiff by Defendant corporation, and for which damage, as above alleged in this paragraph, Plaintiff says Defendant corporation should be compelled to respond in damages in the sum of $75,000.00.

Wherefore, Premises Considered, Plaintiff having answered herein, Plaintiff prays that on final hearing hereof he have and recover judgment against Defendant in the sum of $75,000.00, together with all costs of suit incurred in this behalf, and for such other and further relief, general and special, in law or in equity, to which he may be justly entitled.

Richard H. Cocke, Attorney for Plaintiff and David C. McCord, Attorney for Plaintiff, 519 Mercantile Bank Bldg., Dallas 1, Texas. Telephone Riverside 1855.

Filed Feb. 17, 1954.

[fol. 9] In the District Court of Brown County, Texas

[Title omitted]

Defendant's Second Amended Original Answer.—Filed March 24, 1954

To the Honorable Judge of Said Court:

Now comes Gulf, Colorado and Santa Fe Railway Company, a corporation, Defendant in the above entitled and numbered cause, and files this its Second Original Petition, and for such Answer respectfully shows the Court the following:

I.

Defendant specially excepts to Plaintiff's First Amended Original Petition, particularly the allegations in Paragraph IV. Thereof, wherein it is alleged that Defendant failed to furnish "proper tools," said phrase being

used a number of times in said paragraph, and particularly in Sub-paragraph "A," wherein it is alleged "— in order that said foreman would have had proper tools, as herein described, for the removing of said babbitt," and in Sub-paragraph "C," wherein it is alleged that the Defendant was negligent in "not furnishing Plaintiff with proper tools, as herein described, to remove said Babbitt," for the reason that at no time and at no place does the Plaintiff specify what tools should have been furnished or what tools were proper tools, and in the absence of an allegation stating what tools the Defendant was negligent in not furnishing, this Defendant is unable to prepare its defense to said allegation, and of this exception Defendant prays judgment of the Court.

II.

For further answer, Defendant denies generally [fol. 10] each and ebery allegation contained in Plaintiff's petition, demands strict proof thereof, and of this puts itself upon the country.

III.

For further answer, if same be required, Defendant shows the Court that Plaintiff's injuries, if any, resulted solely from his own acts, conduct and negligence which proximately caused all of the injury, damages and losses for which Plaintiff sues.

IV.

Defendant alleges that on the occasion in fact the Plaintiff, himself, was the person and the only person that made the decisions in this case, which he claims brought about his own injuries. As a matter of fact, the Plaintiff was the man that decided that the pot needed replacing and the Plaintiff himself was the man who decided the old pot should be removed at the particular time it should be removed, that the Plaintiff himself was the man who decided how it should be removed, that the Plaintiff himself was the man that removed it without any instructions given by any of his superiors as to how said work was done, that the Plaintiff did not ask for additional help, did not ask for instructions, and that the way, manner and method used by the Plaintiff were solely of his selection

and that if there was any negligence in the method used, the equipment used, or the amount of help use-, or the way and the manner in which the work was done, the Plaintiff himself was the man that chose all of same of his own volition, without any instruction or requirement from the Defendant, and if there be any negligence involved in any of the matters set out in this paragraph, it was the [fol. 11] plaintiff's negligence and proximately contributed to his alleged injuries.

V.

Defendant alleges that, by way of alternative plea, it was not negligent and if the Plaintiff was not negligent, then the accident occur-ed as the result of an unavoidable accident.

VI.

Defendant further alleges that any pain, suffering or disability which Plaintiff may now have, have in the future, or had in the past, were caused by diseases, injuries, conditions of Plaintiff's body, and other matters for which this Defendant is not responsible.

Wherefore, Premises Considered, Defendant prays that Plaintiff take nothing herein and that on final hearing hereof, it go hence without day and recover all costs in this behalf expended, and for such other and further relief, general or special, at law or in equity, to which it may be justly entitled.

Woodruff & Holloway, First National Bank Building, Brownwood, Texas, Crowley, Hudson & Keltner, By Luther Hudson, 1313 Continental Life Bldg., Fort Worth, 2, Texas, Attorneys for the Defendant.

Filed Mar. 24, 1954.

[fol. 12] IN THE 35TH DISTRICT COURT OF
BROWN COUNTY, TEXAS

No. 12,110

EARL R. DEEN

vs.

GULF, COLORADO & S. F. RY. CO.

Statement of Facts

APPEARANCES:

Hon. David C. McCord of Dallas, and Hon. David J. Morris of Brownwood, Attorneys for Plaintiff

Hon. Luther Hudson, of Crowley, Hudson & Keltner, of Fort Worth, and Hon. R. R. Holloway, of Woodruff & Holloway, of Brownwood, Attorneys for Defendant

Be it remembered that beginning April 12, 1954, the above entitled and numbered cause was tried in the 35th District Court of Brown County, Texas, before a jury, with the Honorable A. O. Newman, Judge presiding, and the facts adduced in evidence and proceedings had were as follows:

EARL R. DEEN, called a witness in his own behalf, was sworn and testified as follows:

Direct Examination.

Questions by Mr. McCord:

Q. Will you please state your name?
A. Earl R. Deen.
Q. Where do you live, Mr. Deen?
A. I live at 1402 Magnolia Avenue, Brownwood, Texas.
Q. How long have you lived in Brownwood?
A. Since 1941.
[fol. 13] Q. Are you married?
A. Yes, sir.
Q. When were you married?
A. In 1939.

Q. And do you have any family?
A. Got three children.
Q. What are their ages?

Mr. Hudson: Your Honor, we object to that as being immaterial and has nothing to do with the case.
Court: I overrule the objection.
Mr. Hudson: Note our exception.

Q. Now, Mr. Deen, how old are you now?
A. Forty years old.
Q. When were you born?
A. July 11th—or June 11, 1913.
Q. And where were you born, Mr. Deen?
A. Blanket, Texas.
Q. That is here in Brown County?
A. Yes, sir.
Q. Where did you go to school?
A. Blanket High School.
Q. Did you graduate from High School?
A. Yes, sir.
Q. When did you—or what line of work have you followed since you graduated from High School?
[fol. 14] A. A number of different jobs, highway work, a little oil field work, water well drilling, section labor for the railroad, railroad work in the Round House, farm work—
Q. And when did you first go to work for the Gulf, Colorado and Santa Fe?
A. In July of '37.
Q. And where was that?
A. In Brownwood, Texas, at the Santa Fe Round House.
Q. And what was your first job with the Gulf, Colorado and Santa Fe Railroad?
A. Laborer.
Q. And then how long did you work as a laborer?
A. Until about '40—the latter part of '40 or '41.
Q. Until latter part of 1940 or first of 1941?
A. Yes, sir.
Q. And then what was your next job?
A. Stationary fireman.
Q. Was that with the Gulf, Colorado and Santa Fe?

A. Yes, sir.

Q. And how long did you work as a stationary fireman?

A. I worked as an extra stationary fireman for about one year.

Q. And then what was your next job?

A. Coppersmith helper.

Q. And that was about 1942?

A. Yes, sir.

Q. And how long did you work as a coppersmith helper?

A. About a year and a half.

[fol. 15] Q. And then what was your next job?

A. Coppersmith.

Q. And how long have you been a coppersmith, now?

A. Approximately twelve years—eleven years I would say.

Q. Now, what was your title and position on or about July 12, 1949?

A. Coppersmith.

Q. And prior to July 12, 1949, had you worked continuously for the Gulf, Colorado and Santa Fe Railway Company since your first employment in 1937?

A. Well, no, I was laid off in the latter part of '37, and I worked some thirty hours du-ing '38, and I was called back in the early part of '39, and practically continuous ever since; I have been cut off and on a number of times, but since that time eighteen days I believe is the longest time I was cut off.

Q. Then since 1939 you have worked practically continuous until July 12, 1949?

A. Yes, sir.

Q. And since 1943 or 1944, when you became a coppersmith, you have worked continuously?

A. Yes, sir.

Q. That is until about July 12, 1949?

A. Yes, sir.

Q. Now, on or about July 12, 1949, did you sustain an accident while working for the Gulf, Colorado and Santa Fe, in which you were injured?

A. I sure did.

[fol. 16] Q. Where did you sustain that injury; what location?

A. I broke my right leg approximately four inches above the ankle.

Q. Now, on that occasion, about July 12, 1949, what shift were you working?

A. What we call the first shift, or day light job, from eight A.M. until four P.M.

Q. And when you reported for work on July 12, 1949, did you report to a foreman?

A. No, sir, I check the clock in.

Q. You did what?

A. Checked the clock card.

Q. Was that what you did on that occasion?

A. Yes, sir.

Q. You did that on the morning of July 12, 1949?

A. Yes, sir.

Q. During—or did you do that—get there on time?

A. Yes, sir.

Q. And during the morning when you reported to work, did any foreman or supervisor assign you duties—certain duties to perform, and did they do that on this occasion?

A. Some mornings they do and some mornings they don't, back in that time, you more or less know your job and what you have got to do, and they have work reports for each engine that you have to work on, and a lot of the time a man goes checks the work report and sees what is his job, and checks the board that they order the engines out to be run, and you can kind of figure it out for your- [fol. 17] self which one is going out first and which one you should work on.

Q. Well, on this particular morning, what duties, or did you figure out the job, or did someone assign your job for that morning?

A. I was working dead work at that time, practically all the time.

Q. Well, now, will you explain to the jury what dead work is?

A. That is the same as you take your automobile to a garage for a general overhaul; you might get it back in a day and you might get it back in a week, it is not in there for minor repairs, like the generator to be fixed, or something like that, but for a major repair and different classes

call for different lengths of time and different amounts of work to be done.

Q. And you talking about engines in for repairs, what do you refer to as to work in the shop?

A. On the morning of July 12, 1949, we had forty hundred class engine over the pit for heavy repairs. That is, the biggest part of it was over the drop pit; it was scattered all over the place there, parts to be repaired in the machine shop, copper shop, blacksmith shop, and at various points, for the type of repair that was to be done to the parts that were removed, and I started on this heavy repair job, as I knew it was about the next thing to come out.

Q. That was on the morning of July 12, 1949?

A. Yes, sir.

Q. Now, had any of the supervising personnel, the fore- [fol. 18] man, assistant foreman, or otherwise talked to you that morning about that engine?

A. Not at the time I went to work; shortly afterwards there was.

Q. About what time of the day was that?

A. Oh, eight-thirty or nine o'clock.

Q. Who was that?

A. Mr. O. W. Williams.

Q. And what did Mr. Williams tell you?

A. Well, he is the assistant foreman, and he came by and he said, "Earl, I have got to have this engine today" and I looked at him—I didn't see how it could be possible—it was impossible—and I looked at him, I guess perculiar, and he said, "I know it, but I have got to have this engine today."

Q. All right. Now, with those instructions, what did you proceed to do after he told you that?

A. I said, "Well, I will do my best."

Q. Well, then where di- you proceed—Where was this conversation, when he told you this?

A. Right by the side of this forty hundred class engine.

Q. Then did you start back to work on the engine?

A. Yes, sir.

Q. Now, who were you working with?

A. I was working by myself; my helper was relieving vacations at that time.

Q. All right, sir, and how long did you work on the engine after he told you that?

[fol. 19] A. Just a little bit.

Q. What caused you to stop working on it?

A. The general foreman's clerk came by and said, "I don't suppose you know it, but your new babbit pot is over at the freight depot, and the Store Department has gone after it for you, and I thought I would tell you, as you might get a little bit of help, if you get down there and get your old one out of the way and stop them there at the door with the truck they might help you put it in."

Q. And who was the general foreman's clerk—what is his name—the man that told you that?

A. W. J. Bettis.

Q. Then, after he told you that, what did you do?

A. I turned everything loose that I had and went to the copper shop.

Q. And what was your purpose in going to the copper shop?

A. To try to take advantage of maybe of getting a little help to replace the new pot in the furnace, as it was badly needed.

Q. All right. Then when you arrived at the copper shop, what did you do?

A. I taken the cover lid—it was completely removable—I taken it off of the furnace and set it over to one side, and we have a crane right by the side of this furnace to handle heavy objects with, and had a chain hoist on it and I swung it around—it is revolvable, you can revolve it in almost a complete circle—I swung it around over the furnace, and I taken a pair of hooks that were made to [fol. 20] handle cross heads with, and that was about all I seen, and about all that I knew of on the entire grounds to remove this old pot with. I taken a buggy bar—pinch bar, and prized the babbit- pot up from the brick walls that it was setting on, just a little bit all the way around, and chinked it with brick until I got it about an inch clearance from the furnace *from the furnace*—that is, the top rim, about an inch clearance. I managed to hook one hook under the babbit- pot on one side, and one on the opposite side at the opposite end, and by taking up gradual

on it, I managed to get it balanced enough that I picked it completely up out of the furnace with the hook; but knowing how heavy it was and there wasn't much hold on it, I taken precaution and stood as far back as the chain hoist would allow me, and pulled it to one side and started to let it down and the babbit- pot fell out of the hooks—

Q. Fell out of the hooks?

A. Yes, sir, fell out of the hooks onto the floor, upright, just like it set in the furnace.

Q. Now, that fall—when that pot fell out of the hooks, that did not hurt you, is that correct?

A. Yes, sir.

Q. You did not sustain any injury from the falling of the pot from the hooks?

A. No, sir.

Q. All right. Now, what was your purpose, Mr. Deen, in going in and removing that old pot?

A. It was so that I could get a new pot in the furnace. [fol. 21] The old pot had a crack in it; it was made of cast iron, and it had been overheated too fast, the expansion wouldn't stand it, and it cracked plumb across. When you would get it warm enough to melt babbit-, the babbit- would run through into the furnace and kill your fire and it would fill the furnace up and you couldn't get it out.

Q. And was it necessary that you remove the old pot in order to get the new pot in the furnace?

A. Yes, sir. You mean the new pot in the furnace?

Q. Yes?

A. Yes, sir; the old pot had to be removed.

Q. All right, and what connection did installing the new pot have with your getting out that engine?

A. Well, I don't remember the amount of work that had to be babbit-ed, but there was cross-head gibs and—I wouldn't say sure that there was other work to be babbitted before that engine could leave or not.

Q. All right, now in removing the old pot, you had some babbit- in it?

A. Yes, sir, some three feet—the babbit-, itself, was from three to four inches deep.

Q. Now, Mr. Deen, I show you a photograph marked Plaintiff's Exhibit No. 1, and ask you if you can identify that and tell the court and jury what it is?

A. That is the babbit- pot, standing looking as it as I am that desk right there in front of me, looking down in the pot from the North end, and it placed in the furnace.

Q. And is that—who took that picture?

[fol. 22] A. I did.

Q. And when—or approximately what date did you take it?

A. The first few day—I would say by the 10th day of November of 1951.

Q. Now that is the same type and same size—the same type and size of the babbit- pot, setting in the same furnace of the type that you were injured with on July 12th, of 1949?

A. Absolutely; that is the new pot.

Q. That is the new pot that you wanted in the furnace?

A. It is still in there.

Q. Now, Mr. Deen, I show you a photograph marked Plaintiff's Exhibit No. 2; was that taken at the same time by you?

A. Yes, sir.

Q. And now tell the court and jury what that picture represents?

A. That picture is a picture of the very same babbit-pot, looking at it after *is* has been taken out of the furnace, turned cross-ways on the furnace, with the hooks that I removed the old one with.

Q. Now then, I show you Plaintiff's Exhibit No. 3; was that taken at the same time and on the same occasion?

A. Yes, sir.

Q. And tell the court and jury what that picture represents, Mr. Deen?

A. That is more a side view of the pot and a very close view of the pot.

Q. In place—

[fol. 23] A. In place.

Q. In the furnace?

A. In place, in the furnace, looking right down in it.

Q. Before it is removed?

A. That-s right.

Q. Approximately how deep, Mr. Deen, would you say that pot is?

A. Without the babbit- in it?

Q. Yes?

A. Approximately ten inches—nine to ten inches, inside depth, I would say.

Q. And approximately how long?

A. Approximately forty inches long inside.

Q. And how wide?

A. Approximately 22 inches wide inside.

Q. Now, Mr. Deen, I show you Plaintiff's Exhibit No. 4, and ask you if that picture was taken at the same time and on the same occasion?

A. It sure was; it sure was.

Q. Explain to the jury and court what that is?

A. That is a picture of the very same babbit- pot, turned at a different angle after *is* has been taken out of the furnace, turned cross-ways on the furnace, in a different angle from the ones we have done looked at, more on a level—looking at it more on a level, it has the same hooks that I used to remove the old pot that caused all the trouble.

Q. Now, Mr. Deen, I show you Plaintiff's Exhibit No. 5 [fol. 24] and ask you to tell the court and jury what that represents?

A. That picture is a picture of the babbit- furnace, with the lid on it—or the pot in it and the lid that covers it, looking it from the South end, or the smoke stac*h* end. What I call the front end is the end opposite of the way you look at this picture; there is a small portion of a kneading furnace that joins this on the back end and has the hooks we used hanging directly over the furnace, with the lid on it.

Q. And that picture was taken at the same time by you, and on the same occasion?

A. Yes, sir.

Q. Now, Mr. Deen, I show you Plaintiff's Exhibit No. 6 and ask you to identify that?

A. That is a picture of the two hooks, it doesn't show quite all of the hooks; there is a ring in the top that is not to be seen and these hooks have—they are made similar to an eye hook, but the hook end that is hanging down inside and the arms was the part I used to handle the babbit pot with.

Q. And now I show you Plaintiff's Exhibit No. 7 and ask you to identify it?

A. That is another picture of the lower portion of the chain hoist, with the chain covering up the ring that holds the two hooks; the hooks made to handle the same pot at the same place at the same babbit- furnace.

Q. These last two exhibits were taken by you at the same [fol. 25] place and on the same occasion as the other pictures?

A. They sure was.

Q. Now, Mr. Deen, after that pot feel from the hooks, then what did you do?

A. I attempted to turn it over. The top of the pot was larger than the bottom, and I knew if I could turn it over I stood a good chance of the babbit turning loose. It was not an absolute fact that it would turn loose, because it could be run—melted down into this crack and sealed into the pot, because the pot was cast iron and lots of times that flies like glass when you hit it with something and burst it.

Q. Now, this pot, did it have babbit- in it

A. Yes, sir; a very good size chunck of babbit-.

Q. What does the pot alone, without the babbit-, weikht?

A. Approximately 250 pounds; that would be a guess for I couldn't say, it would be a guess, but I would say it would weigh 250 pounds or better.

Q. Now, what—at the time and on the occasion of July 12, 1949, what would the babbit- weigh that was in the old pot at that time?

A. I would say it would weigh 650 or 700 pounds.

Q. Making a total approximate weight of about 800 pounds?

A. Yes, sir.

Q. All right, now, were you successful in tipping—in getting the pot up?

A. No, sir; it was bigger than I was in every respect.

[fol. 26] Q. All, right, then, what did you do about it?

A. Mr. Earl Snow, who was working at a blacksmith job—he was working as a helper, but he was relieving a blacksmith who was on vacation, and he was carrying the blacksmith's job, and he came over and said, "Maybe I

can give you a lift" or in some way he remarked that maybe he could help me, and I said "Well, maybe we can pull it toward us, if we can brace ourselves, you can brace there on the work bench, or work table that we have here, and I will brace on the furnace" and so we braced ourselves, tried it and gradually came up with it; but it was very slow because we were over-powered to start with, but we managed to get it up about straight, on its side, and I wouldn't say that I did, but one of us remarked—I think that I was the one that mentioned it to look out that thing sure would mash your toe.

Q. Now, would you step down here before the jury, Mr. Deen, and taking this chair—we will move it over here—taking this chair, as an example of the pot, would you demonstrate to this jury what position you were in, and what position Mr. Snow was in at the time you were trying to lift that pot up?

A. Well, say this is the top of the pot looking up; we tried to lift it by putting our hands under the rim, which is only an inch and a half or two inch rim, and turn it away from us and we were not able to do it. There was a work table or work bench, steel work bench, made of [fol. 27] quarter inch iron, ten foot long and thirty-six inches wide, well braced with drawers full of tools right there, and there was the furnace right here; and this pot was more or less between them and pretty well equally divided. I said, "Maybe we can turn it over toward us by bracing ourselves" and Mr. Snow, best that I remember, reached this way and got it with his right hand, and I was over here to his right side, and I braced on the furnace here from over on the other side with my left hand, and we gradually came up with it, coming toward us; and it was very, very close to us, and as we come up with it, we worked our way back and naturally the farther up we got with it, the lighter it got, and the more it was balanced; so by the time we got it up about even one of us mentioned it to the other and I don't remember which "Look out, that thing sure would mash you," and so we were more or less standing sideways, and I didn't much more than say it, or he didn't much more tha nsay it, than the babbit-sluffed out of the pot, hitting my leg right along there,

and when it did, I fell to my left and that left the pot standing on him and it was more that he could stand.

Q. Now, Mr. Deen, when the babbit fell on you, your right leg, you were unable to stand on that leg after that; is that right?

A. Yes, sir, I was lying on the floor on my side, or at least near my side; I might have turned on my elbow.

Q. Now, Mr. Deen, why did you first try to move the pot and turn it away from you?

[fol. 28] A. If anything falls, breaks, or comes untied, you have a much better chance, because its going away from you, in my opinion; but if it is falling toward me, I haven't got a chance, but if it is falling away from me, maybe I have got a chance.

Q. And neither you or Mr. Snow were able to lift the pot, turning it away from you?

A. No, sir.

Q. Could it have been turned away from you, if you had had more man power?

A. I don't see why it couldn't.

Q. How many additional men would you say it would take?

A. How many——

Q. How many additional men to turn that pot by lifting it away from you?

A. One good man, anyhow.

Q. Now, prior to this accident, what was the work load in comparison with the number of employees you had, working in your particular work out at the shop?

A. I don't exactly understand you—do you mean did I have all that I could do or more than I could do?

Q. Did you have—let me rephrase the question. What was the amount of work the company had to do in comparison with the number of employees working with you to help you?

A. I had more than I could get done and do properly and do justice to it.

Q. And did you at any time immediately prior to this date talk to your foreman about additional help?

[fol. 29] A. A number of times; at least two or three times I had asked for help.

Q. Who did you talk to about it?

A. The general foreman.

Q. And who is the general foreman?

A. M. M. Johnson was general foreman at the time.

Q. And how recently prior to the accident had you talked to him about additional help?

A. As well as I remember it was the day before, but just a day or two days before I asked for help—asked M. M. Johnson for help in the presence of the master mechanic.

Q. And what was his answer?

A. He said "Earl, we will have to do the best we can."

Q. Now, all right, on this particular occasion, did you request any help in lifting this pot?

A. No, sir.

Q. Why?

A. Well, I don't bother anybody too many times to get anything; if I ask a time or two and get no results, that is about all and more especially when I have been told before "you will just have to do the best you can" I taken it for granted that I would have to do this the best I could.

Q. And based on those instructions, you proceeded to handle the pot by yourself and later with the help of Earl Snow?

A. I sure did.

Q. Now, immediately after the pot fell on you, what then happened to you?

[fol. 30] A. I said, "Earl, I believe my leg is broke." Why I said it, I don't know, but I was looking at the bone sticking in—on, down into or on the concrete.

Q. The bone was protruding through the flesh?

A. Yes, sir.

Q. And what did Earl do to help you? Earl Snow?

A. He said, "Well, I will try to lift it, see if you can drag it out now," and he made an awful strain and I said "you can't make it" and he just kind of raised up and bristled his shoulders, and went right back down after it, and managed to pull it clear where I could pull my foot out straight, out from under it; my shoe heel was more or less wedged under it—the shoe heel was setting up edgeways and that was all that kept it from crushing my foot, I suppose.

Q. Now, Mr. Deen, in attempting to turn that pot over and get the babbit- out, were there any tools available that you—available at the shop, which could have taken that babbit- out of the pot?

A. I don't know of any way you could even get a screw driver under it or beside it or a hold of it by busting the pot, which looked awful dangerous to me, you could surround the pot and hazed it but it looked more dangerous than anything else to me.

Q. Now, how would *have* have to go about busting the pot?

A. You would have to have a pretty good sledge hammer and do some pretty hard work pounding it, I am sure.

Q. All right. Did you use the only means available, [fol. 31] considering the tools and equipment furnished at the time to empty the babbit- from the pot?

Mr. Hudson: Your Honor, we object to that because it is an invasion of the province of the jury as to whether he used all the available means to him; that is something the jury must pass on, and it is an opinion and conclusion of the witness, and we object to it for that reason.

Court: Overrule the objection.

Mr. Hudson: Note our exception.

A. As far as I know, there is nothing there, up to this date, to handle such items with.

Q. All right, sir. Then was Mr. Snow eventually able to lift the weight off of your leg?

A. Yes, sir; he cleared it, or something happened, for my foot finally was released, and I was able to manage to drag out from under it.

Q. And then what was done about your emergency treatment?

A. Well, I said, "Earl, you had better go get somebody to come here" and he left, holding his hand this way; and I didn't see him any more.

Q. All right, sir. Then who came to get you to take you to the hospital or to see a doctor?

A. I don't know who the person was, the first one, or the second, or any amount of men; I know they went to gathering in from every direction or something; somebody

slid a piece paste board, or asbestos, under my leg, which was really rough, and some others were bathing my face with some wet waste, and I was thinking or had fear that [fol. 32] I was going to where I didn't want to go, and I begged them to call an ambulance and take me to Memorial Hospital and to call Dr. Cadenhead.

Q. And was that done?

A. That was done; I was afraid that I was not going to be carried until the ambulance driver started to pick me up, and I told him what I wanted, and he said "I will." So, that eased my mind on that.

Q. They then did take you to the Memorial Hospital?

A. Yes, sir.

Q. And who treated you there?

A. Dr. Cadenhead. There was a nurse came in first and then in just a very short time—it seemed like a long time to me, but it couldn't have been a very long time, because Dr. Cadenhead was right there in just a very few minutes at least and he treated me.

Q. What did he do?

A. I asked him for a hypo or something for relief; and he made mention that I was in a heck of a mess, and I said "Yes, but I wouldn't be in so much of a mess if I could get a little relief." So, he ordered a hypo or some kind of medicine.

Q. And then he completed the preliminary treatment and the setting of your bone in your leg?

A. Yes, sir.

Q. And then subsequent to his setting of your leg, and placing it in a cast, where did you go for further treatment? [fol. 33] A. I went to Temple, to the Santa Fe Hospital by ambulance, just a little bit after they placed me in a room out there. They first said to hold me until late in the afternoon on account of such hot weather, and then they phone back and said there was an out-of-town bone specialist there—or that is the way I understand it—or at least the bone specialist was in the hospital and he was waiting for me, and they called an ambulance and carried me down.

Q. And that specialist—that bone specialist at the Temple Hospital reset your leg, did he?

A. Yes, sir, or he operated on my leg.

Q. Was it necessary to—or did your bones heal naturally or did they put pins in there?

A. They've got pins in there.

Q. Then how long were you in the hospital at Temple?

A. As well as I remember, I stayed six or seven days the first time; they released me then and I came home for approximately a week, and then went back for two days, I believe. They released me for approximately two weeks, and I came home and went back and stayed—I don't remember whether it was one day or three days, but along in that time I went back and stayed one day and was released, and one time right in there that I stayed three days, and then from there out each time it got further and further apart having to report back until it was a month; then I would come home and stay a month and report back for a day or two days for treatment and examination.

Q. What kind of treatment would they give you when you [fol. 34] would report back to the hospital; or what was the purpose of your going back to the hospital?

A. To examine the cast; several times they trimmed a little of the edge off, not near as much as I wanted off, because it bothered me an awful lot and they would give me a little bit of relief medicine along at the first to bring home with me; and Xray it from once to six or eight times each time I went down there.

Q. Now, during this time, the first two or three weeks after your injury, what condition was your leg in as far as causing you any pain?

A. Well, it was on fire it seemed like; it was so hot; and about the only rest that I could get was from medicine, aspirin tablets, or something similar.

Q. All right, sir, and how long was your leg in the cast?

A. Approximately four and a half months.

Q. Four and a half months from July 12, 1949?

A. Yes, sir.

Q. Then when did you return to work?

A. April 3rd, 1950.

Q. April 3rd, 1950?

A. Yes, sir.

Q. And what was the condition of your leg at the time

you returned to work on April 3, 1950, as to movability or mobility was concerned?

A. Well, awful stiff, awful tender and it hurt every step that I *taken*, and most any load that I carried made it hurt worse. It was weak and it was much smaller than [fol. 35] my other leg.

Q. Now—you say it was smaller than your other leg?

A. Yes, and it is still smaller than my other leg.

Q. Now, you talk about it being smaller; what do you mean by that; is it smaller in circumference or in length, or how do you mean?

A. I mean around; here and here; this muscle and this muscle is smaller than this one and this one is weaker.

Q. And what about placing your weight on that foot, *fo* you experience any difficulty?

A. I can't stand on my right leg; just stand up and release one and then the other.

Q. And what do you experience when you try to place your weight on that right leg?

A. It feels weak and hurts.

Q. And where does it hurt?

A. Right where it was broke and below.

Q. And what do you mean by below?

A. The heel and ankle—right in here.

Q. Will you set your *let* on top of that railing there, and pull your pant leg up, and just point out to the jury where the injury and break was?

A. Right here; the bone punched a hole across this way, I would say a 45 degree angle; and the doctors cut some two or two and a half inches this way and about three inches up this way, making the incision big enough to get four fingers in it to repair or to fix the joints.

Q. Do you experience any other difficulty?

[fol. 36] Well, it is numb—my heel is numb at all times and it is cold at all times; once in a while it feels like the blood vessels have air—like the blood *b*essel has air in it. It feels like air bubbling right in under here, trying to come back up and doesn't; and very often very sharp pains come under the ankle and up to the place located right there.

Q. Now, with reference to your every day work, Mr. Deen, does it effect you in any way wit hreference to your work?

A. Yes, sir; it slowed me down a whole lot, and I can't claimb like I one time did; I can climb on a ladder that doesn't have a flat one by four—or a ladder that does have a flat one by four, but anything else that-s round—I can climb a ladder with a perfect round rod or step in it, but it is very uncomfortable and is unsafe, for I don't have the sense of feeling when I put that foot down as I do in the other.

Q. All right. In your every day work, is it necessary that you climb?

A. Very much.

Q. What do you climb on?

A. Well, you have to—if you do anything at all on an engine—there are some few jobs that you can do from the ground and there are less jobs to be climbing ladders in one sense of the word now than there ever was since we have diesels, but we have some four or five steps to climb in order to even get in the engine room of a deisel engine and there is various jobs around the Round House that has to be taken care of at intervals that require the climbing [fol. 37] ladders. There is more walking now than there has been in the past, but every man that works in the shop has more or less a right smart of climbing to do. It is not so very far a lot of times, but there is not too much that you can do without some climbing.

Q. How often do you experience pain in that leg?

A. Well, sometimes I will go two or three days an- not necessarily notice severe pain. I notice pain every day and practically every hour in my work and what not; but there is days when it is much worse than others; in fact that I eat aspirin about like a dope head does other things.

Q. The purpose of this aspirin, you taking aspirin, to relieve the pain?

A. Yes, sir.

Q. Prior to this injury, you never had an injury to your leg before?

A. No, sir.

Q. Or to either leg, right or left?

A. No, sir.

Q. Or to either of your upper extremities or lower?

A. No, sir.

Q. Have you any effect with reference to your knee cap?

A. Well, the knee cap—I couldn't say that it has, but the knee itself is stiffer than it had been.

Q. Now, from the standpoint of your social interests; prior to your injury, did you dance?

A. Yes, sir.

[fol. 38] Q. Well, do you dance—or did you like to dance?

A. Yes, sir.

Q. Subsequent to your injury have you danced?

A. No, sir.

Q. Are you able to dance?

A. No, sir.

Q. Have you tried to dance?

A. Yes, sir.

Q. Why can't you now dance?

A. My foot—all but my right foot wants to, but my right foot don't want to and I can't dance much without it.

Q. All right. Now, Mr. Deen, prior to and at the time of your injuries, what were you earning from your employment with Gulf, Colorado and Santa Fe?

A. Three hundred dollars a month and better.

Q. Were you on an hourly rate?

A. Yes, sir.

Q. And what you—what was your hourly pay as a coppersmith?

A. I can't even tell you; it was a dollar and a few cents an hour—one or two cents—I know there would be a cent or two added to it; it was a dollar and two or three cents.

Q. Well, your take home pay was how much?

A. At the time I was injured?

Q. Yes? Per month on the average?

A. Approximately $280.00.

Q. That is after deductions?

[fol. 39] A. Yes, sir; $280.00 to $300.00.

Q. After deductions?

A. Yes, sir.

Q. All right, sir, now, since your injury on July 12, 1949, to April 3, 1950, when you went back to work, did you receive any pay from the Railway Company?

A. I received ungranted vacation on the 16th of January, 1950, that I was entitled to in 1949.

Q. And what was that for? Two weeks?

A. Yes sir.

Q. And you were paid for that?

A. Yes sir.

Q. Do you remember what you- pay was for those two weeks?

A. I believe the check was $144.00.

Q. Other than that the, from July 12, 1949, to April 3, 1950, you were unable to earn any money by working?

A. That-s right.

Q. And upon your return on April 3, 1950, did you get your same job back?

A. Yes sir.

Q. And were you paid about the same amount of money?

A. There had been a raise came in while I was off, and I got the benefit of that.

Q. You got the benefit of that raise?

A. Yes sir.

Q. Now, you returned to work on April 3, 1950; were you completely physically able to do you- job at that time?

A. I was not.

[fol. 40] Q. Then why did you return to work?

A. I asked the doctor when he was going to release me, I said "What do you think about it" or he asked me what did I think about it and I said "I would like to try" and he said, "On that ground, I will let you try it" and I did because the bread line was getting short and I had regular bills all the time; and the friends and people of this good City were nice and went right along with me and carried me over, but it was a burden to be carried so far and no farther; I didn't know when they was going to say no further.

Q. And you returned to work there in spite of the suffering from your leg?

A. Yes sir.

Q. Now, Mr. Deen, you returned to work even though you were handicapped and still handicapped on account of the condition of your leg?

A. Yes sir.

Q. All right. With reference to your injuries, have

you paid out any extra expenses in the way of medical treatment or anything?

A. Not from the Railroad Company.

Q. The Railroad Company paid for that?

A. They paid for—I don't know who paid, but we have a hospital Association that takes care of all medical and surgery and what not, if you go take it and——

Q. That was——

A. Sir?

[fol. 41] Q. Go ahead?

A. It was paid for by the Hospital Association so far as I know; but I have never been given a statement on any of it.

Q. And do you contribute to that Hospitalization Employee Plan?

A. Once each month; it-s with held, whether you want to use it or not, its withheld.

Q. Withheld from your pay?

A. Yes sir.

Q. Mr. Deen, with reference to your obtaining future employment; what effect will your injuries have on that?

Mr. Hudson: Your Honor, that calls for an opinion and conclusion and invades the province of the jury.

Court: I sustain the objection.

Mr. McCord: That-s all right now.

Mr. Hudson: We will waive cross examination of this witness at this time, as counsel indicates he would like to call Dr. Cadenhead and Dr. Branch out of turn so they may be excused.

Dr. E. F. Cadenhead, called as a witness by the Plaintiff was sworn and testified as follows:

Direct examination.

Questions by Mr. McCord:

Q. Will you state your name, please sir?

[fol. 42] A. E. F. Cadenhead.

Q. You are Dr. E. F. Cadenhead?

A. Yes sir.

Q. Dr. Cadenhead, where do you practice?
A. In Brownwood, Texas.
Q. And you are a graduate M.D., are you not?
A. That-s right.
Q. And where did you receive this degree?
A. From Baylor.
Q. Baylor?
A. Yes sir.
Q. How long have you practiced and in Brownwood?
A. About twenty years.
Q. And what do you confine your practice to, Doctor, is it a general practice?
A. General work.
Q. General work?
A. Yes.
Q. You also, do you not, I believe, have a surgical degree too?
A. That-s right.
Q. And your practice mainly in Brownwood, do you not?
A. That-s right.
Q. Do you know Mr. Earl Deen?
A. Yes, I do.
Q. He is the plaintiff in this suit against the Gulf, Colorado and Santa Fe Railway Company, and did you have an occasion to see him on or about July 12, 1949, professionally?
[fol. 43] I did.
Q. Where did you see him?
A. I saw him at—as an emergency case at the Hospital, at the Brownwood Memorial Hospital; he was brought in in an ambulance.
Q. And did you examine him on that occasion?
A. He had a fractured leg about midway between the knee and ankle—I forget which leg it was.
Q. The right leg?
A. Right leg—that-s right.
Q. And on that occasion did you treat him, or set the leg?
A. Yes; we gave him—he was in a little state of shock, a lot of pain, and we gave him some morphine and Xrayed

him, and gave him a general anesthetic and reduced the fracture and put a cast on.

Q. And on that occasion you also Xrayed his injuries, did you not

A. Yes, Xrayed it, after the cast was applied and the best I can remember the—I have the film here—the anterior posterior film was satisfactory, but the lateral film was not quite satisfactory in my opinion for the tibia—the fibula was all right, and of course as with all those patients why we always send them to the Company's Hospital as soon as we get them in shape; in fact we are instructed to send them as soon as possible, and he was sent by ambu- [fol. 44] lance on into the Company's Hospital that afternoon.

Q. Now, Doctor, so that the jury will understand, what is meant by the medical term "Tibia,"—

A. That is the large bone in the leg.

Q. The large bone in the leg?

A. Yes, sir.

Q. And what is meant by the medical term "Fibula?"

A. Fibula; that is the small bone.

Q. Small bone in the leg?

A. Yes, sir.

Q. Now, on your examination of Mr. Deen, did you find that he had a simple fracture or a compound fracture?

A. No, it was a compound fracture.

Q. And the bone was protruding through the flesh?

A. Through the flesh?

Q. Yes, sir?

A. It was—there was some bleeding, but it was not severe.

Q. Now what is meant medically, Doctor, by "Compound Fracture?"

A. Compound fracture is usually *is* where there is quite a bit of displacement and some protruding through*t* the flesh.

Q. And a simple fracture is just the opposite of that?

A. Yes, sir.

Q. There is no protrusion through the skin in a simple fra-ture; is that right?

A. That-s right.

Q. Dr. Cadenhead, with reference to injuries of this [fol. 45] type is it probable, even after you have healing of the bone, and that patient should suffer some pain—or is it probable that a patient should suffer some pain and physical disability from a fracture of this type?

A. Yes; they do sometimes.

Q. And is it considered in medical circles that such pain is real, or is it considered a phantom?

A. Well, I think—a phantom thing to my mind means something like you have got a pain in the stomach when your stomach is gone, but you've got a pain there; now, that is more or less a phantom factor; but I would say that a pain like this—it would be a real factor.

Q. A real factor?

A. Yes; it could be—it will vary in different individuals according to their nervousness.

Q. Yes, sir?

A. Some folks have a lot of pain and some don't. Our observation of pain is the manifestation on the part of the patient. Theoretically they all have the same amount, but they all manifest it different.

Q. Is it probable that an injury, such as Dr. Deen received, considering him to be a man who is a laborer type and works with his physical capabilities, is it possible that such injuries could possibly—permanent in the future?

Mr. Hudson: Your Honor that is asking him what is possible; if the doctor has examined this man and has an opinion about whether the man is disabled or not after he has worked out there for four years, he can express it; [fol. 46] but what is possible or what is theoretical and what is speculative is not admissible in this law suit, and we object to it for that reason.

Court: I sustain the objection.

Q. Now, Dr. Cadenhead, have you seen Mr. Deen subsequent to July 12, 1949, on any occasion?

A. Yes.

Q. Now, when was that? Do you know, or can you recall approximately?

A. Well, I have seen him injured once since then, and, of course, medically in the office I have seen him a number

of times; but the date was eleven and the tenth, fifty-two when he came into the hospital.

Q. What was the reason for that call?

A. He had an injury to this same leg, the thigh; he had a long scratch on—above the knee, and then some generalized bruises below the knee. In other words, we had a little fear that he might have re-injured his fracture.

Q. And did he call on you on that occasion and as the Company doctor?

A. Yes.

Q. And that was done while he was at work?

A. Yes.

Q. From your conclusions, having examined him on December—or on July 12, 1949, and then again on the tenth day of November, 1952, is it probable that his condition in his right leg is very tender and susceptible of swelling and such if bumped against something?

[fol. 47] A. It would at that time; but now I have not examined his leg since that time.

Q. Yes, sir. And what condition did you find in his leg on that occasion?

A. Well, the Xrays are here.

Q. I see. Doctor, do you have the Xray taken on July 12, 1949?

A. Yes sir.

Q. And the report connected thereto?

A. Yes, sir. Here is a film made, what they call a scout film there, with the fracture there of both bones.

Q. Now, can we identify this, Doctor, as we go along?

A. I was looking to see there; I don't believe that has got an identity on it.

Q. Doesn't it?

A. No, it doesn't. These are so called scout films here; There is the first one that was made and it doesn't have the number on it, why, I don't know. Here is a film made after the cast was applied, and you can see the cast here, and that is the fibula reduced, and this is not quite as well reduced as we would like; that is what we call——

Q. Now, wait a minute, Doctor, we would like to identify this as we go along; we would like to identify this as Plain-

tiff's Exhibit No. 1, and this one as Plaintiff's Exhibit No. 2. Those pictures were taken under your supervision, were they not?

A. Yes, This film is supposed to have a number on it like that one right there, but it does not.

[fol. 48] Q. But do you recognize it——

A. Oh, yes, of course, the fracture line is right here, and these, of course—here is the film that was made after the cast was put on. That is a lateral view here, you can see the displacement.

Q. We will identify that as Plaintiff's Exhibit No. 3, the one that you have on the view box now; and what does that picture show?

A. It shows the case with the fracture here.

Q. The fracture there?

A. Yes, sir. And this is a portion—this is another picture of the knee. It has got the identity on it there.

Q. Now, is that Mr. Deen's knee at the time?

A. Yes.

Q. Now that—does that Xray show you anything or is it negative?

A. No. This belongs to the other set of films.

Q. I see, Yes, sir; later on?

A. Yes, you see here the date, right there.

Q. Yes, sir?

A. That is another view of this same film here, you see.

Q. I see?

A. Another view there. All three of these films—all four were made of this person—they were made without reduction. These are the ones with the cast applied.

Q. Yes, sir?

A. Now, the Xray reports are here too.

Q. I see. Now, did you ask on that, Doctor, did you have [fol. 49] a radiologist report on these films?

A. Oh, yes; this is the radiologist's report. We always rely on the radiologist's report.

Q. I see. And did he give you any opinion at that time?

A. Yes sir.

Mr. Hudson: Now, your Honor, the radiologist's report would certainly be hearsay and we object to it.

Court: I sustain the objection.

Q. Now, do you have any pictures there, Doctor, of the treatment or Xrays in November of 1952, or October?

A. Yes; these are the ones taken when he came in.

Q. I see?

A. We were checking the femur there and it didn't show anything there, you see?

Q. Yes, sir.

A. There is the date there.

Q. Now, Doctor, what do you mean by the femur?

A. That is about the knee.

Q. Above the knee.

A. Yes.

Q. All right——

A. And also down below; there is the ankle there or the ankles.

Q. I see; on both?

A. Both the pial and lateral view.

Q. I see.

A. And there is the knee joint that I showed you while ago, and here is the film of the fracture—that is, the [fol. 50] old fracture.

Q. That is the fracture that happened on November 12, 1949?

A. Yes.

Q. And this was taken, I believe, in October of '52?

A. November.

Q. November 10, 1952?

A. Yes sir.

Mr. McCord: Thank you, Doctor.

Cross-examination of Dr. E. F. Cadenhead.

Questions by Mr. Hudson:

Q. Doctor, I don't have many questions to ask you. Is Mr. Deen a private patient of yours, as well as a railroad employee sent to you?

A. No, sir. His family is.

Q. His family is?

A. Yes.

Q. Now, Doctor, in your direct examination, you were

asked whether you said, I understood that when he had this second injury you thought maybe it involved the original break; is that correct?

A. Yes.

Q. But it did not?

A. No.

Q. And he had sustained some scratches and bruises on the same leg, but it did not involve the same break?

A. That-is right.

[fol. 51] Q. That is correct?

A. Yes sir.

Q. And you have never given him an examination to determine the extent of his recovery, or anything of that sort; is that correct?

A. That-s right from this—this film here is the thing I have had, other than his complaints of other things that he would come in for he would at the same times complain of swelling and soreness in his leg, you see.

Q. In other words, you knew that he had been working out there for about four years since he went back, and at different times he would come up there about different things; is that right?

A. That-s right.

Q. And the last Xray you showed there, does that show that he had the breaks or-*gi*ginally found had well healed?

A. Well, to me the calcium had been deposited, but that was not the purpose of my examination then, other than that I didn't find a fracture there.

Q. And other than that one time back in November of 1952, you did not make any examination to determine whether he was able to work or not work—all you knew was that he had been working?

A. That-s right.

Mr. Hudson: That-s all.

Mr. McCord: That-s all, Doctor.

[fol. 52] Dr. William M. Branch, Jr., called as a witness by the plaintiff, was sworn and testified as follows:

Direct examination.

Questions by Mr. McCord:

Q. Your name is Dr. William M. Branch, Jr.?
A. Yes.
Q. Where do you live, Dr. Branch?
A. In Dallas.
Q. And where *do* you office?
A. In Medical Arts Building, in Dallas.
Q. Are you a licensed medical doctor?
A. Yes, sir.
Q. Where did you go to school, Doctor?
A. Academic school in the University of Texas, and Medical school to Baylor College of Medicine, and also Southwestern.
Q. And, Dr. Branch, have you had any special training?
A. Yes.
Q. Will you tell us what that is?
A. A year of internship at Baylor Hospital in Dallas, and then two years in the Air Force, and then four and a half years of bone specialty training to satisfy the requirements of the American Board of Orthopedic Surgeons.
Q. And what do you, or are you practicing, specializing, or limiting your practice to at this time?
A. Bone and joint surgery.
Q. And for how long have you been engaged in that?
[fol. 53] A. A little over two years.
Q. And that practice has been at Dallas, has it?
A. Yes, it has.
Q. And how long, Dr. Branch, have you been in the practice as an M.D.?
A. Since I graduated from Medical School—ten years.
Q. Ten years?
A. Yes.
Q. Now, you have had occasion to examine Mr. Earl Deen?
A. Yes.

Q. This is Mr. Deen sitting here?

A. Yes, it is.

Q. Now, how recent did you examine him?

A. Yesterday.

Q. And at that time did you take some Xrays concerning his injuries?

A. Yes; I did.

Q. Do you have those with you, sir?

A. Yes.

Q. Also, do you have with you some Xrays taken in 1951?

A. I have some Xrays that were taken at a previous time, and, yes, they were taken in April of 1951.

Q. They were taken in April of '51?

A. Yes.

Q. Now, Dr. Branch, with——

Mr. Hudson: I don't want to be technical, if the Doctor knows these are Xrays of the same man, all right, I don't object to them, but he didn't supervise them and I want [fol. 54] somebody to vouch for them; that-s all.

Mr. McCord: We are not——

Mr. Hudson: I don't care if he didn't supervise the taking, if he knows they are of the same man, or from looking at the different Xrays he can tell it is the same man, I don't care; I am not being technical about it at all; I just want somebody to vouch for them.

Mr. McCord: We are not asking to introduce them yet.

Mr. Hudson: You are asking to have him testify from them——

Mr. McCord: We are going to introduce first the ones he made yesterday.

Q. Dr. Branck, will you take your Xray that you made yesterday of Mr. Deen, and place it in the view box. Now, for the purpose of identification, we will want that to be identified as Plaintiff's Exhibit No. 5. Dr. Branch, what position with reference to Mr. Deen's leg was that picture taken?

A. That Xray was taken in both a front and side view, or anterior, posterior and lateral views of the fracture site.

Mr. Hudson: Both on one film?

A. Yes.

Q. Now, will you identify what each of those are?

A. This is the side view of most the entire tibia with the foot being in this position; the bottom of the film; this being the fracture site with two metallic screws at the [fol. 55] fracture site on the opposite side of the Xray is the front view, or anterior-posterior view with the foot at the bottom of the Xray, with the two metallic screws in place, showing the healed fracture of the tibia and the fibula.

Q. And now, did you take any other Xrays yesterday?

A. Yes.

Q. Do you have them?

A. Yes.

Q. Will you identify that?

A. This picture was taken out of this patient's knee and the remaining part of the lower leg bone that was not demonstrated on this film; it shows the front view of the knee and this projection on this side of the film and the side view of his knee on this side of the Xray.

Q. Now, in your opinion, Doctor, from reading that Xray, does that show anything with reference to disability of the bone structure?

A. No, I believe not; this knee is within normal appearance.

Q. Now, for the purpose of identification, this will be Plaintiff's Exhibit No. 6. Now, with reference to Plaintiff's Exhibit No. 5, what does that show?

A. The front and side views of this leg reveals the presence of an old healed fracture at approximately the juncture of the middle dissal third of the right tibia and fibula. This fracture was held, before it healed by two metallic screws, and had gone from that point to a firm union of the bone of the tibia; the fibula had healed and [fol. 56] and without any metallic fixation—it had healed and good position allignment without metallic fixation. The over all allignment and position of this fracture and the entire leg is good.

Q. Now, Doctor, having examined Mr. Dean, and Xrayed him with reference to this fracture, have formulated any

opinion with reference to future disability, if any, concerning this patient?

A. Yes, because of the changes in this patient's lower extremity it is my opinion that he has twenty percent permanent partial disability.

Q. Now, Doctor, for the purpose of the jury, what do you mean by twenty per cent partial permanent disability?

A. Twenty per cent permanent partial disability of this extremity refers to the amount of disability of change that this man has that will be present for the remainder of his life; depending, of course, upon how much he uses it. Permanent partial disability is usually made up of permanent changes in an extremity as a result of an injury; such changes as muscle changes, circulation changes, skin changes, and joint changes. I believe that covers it.

Q. Now, Doctor, considering this injury to Mr. Deen, based on your examination, is it probable that Mr. Deen will suffer future pain with reference to this injury?

A. Yes.

Q. And based on your opinion and examination and medical science, is that pain a real pain, or an imaginary pain?

[fol. 57] A. No; he can have some pain with this extremity.

Q. And is it probable that up to this time he has had pain?

A. Yes.

Q. Now, Doctor, with reference to your opinion of this twenty percent disability—twenty per cent partial permanent disability, does that apply to Mr. Deen, or to the patient's entire physical body?

A. That applies to the injured part; his right leg.

Q. To his right leg?

A. Yes.

Q. Doctor, did Mr. Deen describe to you the feeling of numbness in his heel?

A. Yes; yes, he did.

Q. And his symptoms of numbness?

A. Yes, he did.

Q. Now, in your opinion, would that be a permanent thing with him, or a temporary?

A. If it were a temporary thing, it would have healed and returned by now. It has had over four years to heal and if it were going to heal, it would have healed by now. I believe it is a permanent lack of sensation.

Q. Based on his—on your observation and examination, is it possible or probable that Mr. Deen could not feel the sensation of a pin prick in his heel? Or did he discuss that with you?

A. He did, and I examined him over the inner and outer [fol. 58] aspects of his right heel, and superficial sensation was diminished; it certainly was; yes.

Q. And with reference to his right leg, as compared to his left leg, did you find from your examination, any difference as to size?

A. Yes; he had an inch of muscle atrophy, or an inch in circumference in measurement of the calf muscles and an inch of atrophy in his thigh muscles.

Q. Now, also, Dr. Branch, based on your examination—did you examine his right knee?

A. Yes; I did.

Q. And based on your examination, did you find anything—or any disability in it?

A. The right knee lacks probably five degrees of complete extension, which is the result of the muscle atrophy in his thigh; this creates a bent knee for weight bearing, which is not good. Other than that, there were no positive findings in the knee that would disable the knee. It was a stable knee and had no point tenderness area in it.

Q. Dr. Branch, would the lack of sensitivity in his right *foor* or heel make it difficult for him to get around in his work, or to climb ladders, or to climb over gauges and such as that?

A. Yes; anyone involved in such a job should, of course, be able to feel where his foot is when he steps in some such precarious manner on a ladder of that type, it—you would feel much more sure of where you- foot was if you had [fol. 59] normal sensation in it.

Mr. McCord: I believe that-s all. Thank you, Doctor.

Cross-examination of Dr. William M. Branch.

Questions by Mr. Hudson:

Q. Doctor, how long have you been treating Mr. Deen?

A. I have not treated him at all.

Q. Oh——

A. I have just examined him.

Q. You just examined him for the purpose of being able to testify?

A. Yes.

Q. And other than that one time you had never seen him?

A. That-s true.

Q. Now, Doctor, in making up your mind, I call it, doctors say opinion and such things, in forming your opinion as to the man's disability, as you have expressed it here, do you go into the history that he gives you, of his injury and what has happened to him, and that sort of thing?

A. Yes, that is part, of course, of any valuation of a patient; but that contributes almost nothing to his disability valuation, however.

Q. All right. You go into the subjective symptoms that he might have, or things that he tells you?

A. Yes.

Q. All right. Now, does that have any effect on your opinion as to his permanent disability that you have just [fol. 60] testified about?

A. No, sir.

Q. In other words, the only opinion that you would express would be based wholly on the Xrays that you took and the measurements that you made and your own tests and what not; is that correct?

A. The objective findings; yes, sir.

Q. And what he tells you of his history would have nothing to do with it?

A. No.

Q. Well, did you know that for the last four years he has been very steadily employed, drawing his full time virtually every day—every workable day?

A. Yes; he told me that.

Q. But that would have no bearing on your opinion whatsoever; is that correct?

A. It had some bearing, of course, it helped me make up my mind for my disability valuation opinion.

Q. Is it true, Doctor, that some people have more pain than others?

A. Definitely; yes, sir.

Q. Is it entirely possible for one individual to continue working very steadily and have some pain and it not disable him?

A. Sure; lots of people have pain.

Q. The fact is that most people have a little pain all the time from one time to another, don't they?

[fol. 61] A. No; I don't think so. Several people have pain, but I don't think that most every one has pain; I certainly don't hurt.

Q. Do you judge everybody by yourself, Doctor?

A. Well, I take myself as an average individual; yes.

Q. Well, we won't go into how many aches I've got. All right. Now, Doctor, as far as the fractures are concerned, it is obvious that he had a rather serious break of both bones in his right leg; is that correct?

A. Yes.

Q. But you said they were well healed?

A. Yes; they are.

Q. And that the allignment is good?

A. Yes; it is.

Q. And as far as the bones are concerned, he got a good leg out of it?

A. I would have to have you define what a good leg is.

Q. Well, I am not a doctor, but I would say one that is straight and lined up and able to bear his weight and to walk on?

A. That is true.

Q. All right. And the things you give him the disability on are the muscular conditions you find?

A. That-s one of the t-ings; yes.

Q. Now, Doctor having walked around with a limp myself for thirty years, I want to ask you this question: Is it true that a limp very frequently is a habit?

A. That may very well be; yes, sir.

[fol. 62] Q. When a man starts out, as Mr. Deen did, going back on a job, his leg hurts at first, and he gets the

habit—he has to limp at first because it hurts; and is it very often true that once having formed that habit, he will continue to limp although he does not need to from a mechanical standpoint?

A. That may be true.

Q. All right. Doctor, what is the best test as to whether a man is able to do a job, the doctor's opinion, or his doing the job?

A. Well, in doing the job, obviously.

Mr. Hudson: All right. I think that-s all.

Redirect examination of Dr. William M. Branch.

Questions by Mr. McCord?

Q. The fact that a man is doing the job does not mean that he does not suffer pain, does it, Doctor?

A. No.

Q. It doesn't mean also that he does not have to do the job because he has to be making a living?

A. Obviously it does not.

Q. For his wife and three children; that-s the reason why I work——

Mr. Hudson: That-s the reason I work too.

Q. Now, counsel asked you something about a good leg; what is your definition of a good leg, Doctor?

A. Well, a good leg, I suppose that I would compare it to a normal leg, and a normal leg should be composed of an [fol. 63] extremity with normal muscle power, and a normal range of motion in all the joints in that extremity, no skin change whatsoever, and no circulation or nerve change whatsoever in the extremity.

Q. And would that definition hold true with a leg with a couple of silver screws in it?

A. No.

Q. That would not be your definition of a good leg?

A. No.

Q. Because a leg that has had a compound fracture and has a couple of screws, such as this leg has, is not a normal leg, is it?

A. It is not a normal leg; no.

Recross-examination of Dr. William M. Branch.

Questions by Mr. Hudson:

Q. Doctor, let me ask you something: do you know Glen Cunningham, that used to be called the fastest human in the United States?

A. I have heard of him.

Q. Did you know that he had a broken leg before he became the fastest human in the world?

A. No; I sure didn't.

Q. Or that his leg was badly burned?

A. I didn't know anything about it.

Q. All that I am asking Doctor is that whether the man had a broken leg, or whether he had a burned leg, or injured [fol. 64] leg; that doesn't mean that he does not have a good, usable limb for some purpose, does it?

A. Not perfect; he can have all typed of injuries to his extremities and ultimately end up with an extremity that he can walk on.

Q. Usable for general purposes?

A. Depending on the activity you ask him to do; yes, sir.

Redirect examination of Dr. William M. Branch.

Questions by Mr. McCord:

Q. It is equally ture, isn't it, Doctor, that one leg that is broken may heal in one way and another in another?

A. Yes.

Q. There are no two legs that heal alike after they have been fractured?

A. Many of them are very, very different; yes, sir, and each one is an individual case.

EARL R. DEEN, having been excused for placing the physicians on out of turn, was recalled for cross examination, and testified as follows:

Cross-examination.

[fol. 65] Questions by Mr. Hudson:

Q. Now, Earl, you made one mistake about your wages in your direct testimony, did you not?

A. Yes, sir; I told the man I was receiving a dollar and some one or two or three cents an hour; I was receiving—or I am receiving now, when I am on the job, two dollars and some two or three cents an hour; it figures a fraction over sixteen dollars a day and then the withholding is taken out. At the time of my injuries I believe I was a dollar and forty-six and some cents—or a dollar forty and some odd and tenth cents an hour.

Q. Well, in other words, you are getting more now; you are, to boil it down, getting about fifty cents more now than you were getting at the time you got hurt—or rather you are getting about fifty cents an hour more now than you were when you got hurt?

A. Yes, sir.

Q. They have not cut your wages because you got hurt, have they?

A. No, sir.

Q. You haven't been demoted, have you?

A. No.

Q. You are still at the same job that you had before?

A. Yes, sir, with the exception of five days a week instead of seven days a week.

Q. Well, that didn't have anything to do with your injury, did it?

[fol. 66] A. No, sir, but——

Q. Your working only five days *a*week instead of seven?

A. No, sir, it didn't, but it has a right smart to do with your take home pay when it-s summed up.

Q. What I am getting at, if you had not got your leg hurt, you would still be working just five days a week, wouldn't you, Mr. Deen?

A. Yes, sir.

Q. As a matter of fact, the last year or two they have gone almost wholly to diesels and you don't have quite as much work to do out there as a coppersmith; is that right?

A. That-s right.

Q. Now, Earl, you were off—You don't mind if I call you Earl, do you?

A. That-s fine; I rather you would.

Q. You were off from July 12, 1949, until April 3, 1950; is that correct?

A. Yes, sir.

Q. Do you know how much you- wages would have been if you had been working during that time?

A. I know how much the man drawed that worked my job?

Q. All right, then if you had received the same amount he did—how much did he draw?

A. He received $2,781.19. He earned that.

Q. Beg your pardon?

A. He earned that; he didn't get all of that, as there was withholding of different types.

Q. In other words, it would have been somewhere around [fol. 67] twenty-seven hundred or less than he actually got?

A. His take home pay would have been something less, or around twenty-five hundred, I would say.

Q. All right. But during that time you did get some hundred and forty dollars from——

A. I got $144.00.

Q. Actually your out of pocket was somewhere in the neighborhood of $2,250.00?

A. Yes, sir.

Q. I miscalculated that, Earl, it would be $2,350. Mr. Holloway says it would have been $2,350.00; I didn't mean to shortpot you; it is $2,350.00. Is that right?

A. Yes, sir.

Q. All right, now, April 3, 1950, is when you went back to work?

A. Yes, sir.

Q. And this past April 3, 1954, was four years later?

A. Yes, sir.

Q. During that time, Earl, isn't—a fact that you worked pretty darned steady?

A. Yes, sir.

Q. As a matter of fact, during that time, four years, other than your regular vacations—your regular days off—you had less than thirty days during the four years that you have been off the job?

A. I am sure of that.

Q. And during that time you have drawn some—well, let [fol. 68] me ask you this: How much over time have you drawn during that four years?

A. Not much.

Q. In other words, you have not drawn as much over time as you have off time, or would you say you have? I think you have, but I want to ask you?

A. I don't believe I have; I hadn't even thought about it.

Q. But you have drawn over time, haven't you?

A. Yes, sir.

Q. And have you been drawing fifty cents a week more than when you were working—fifty cents an hour more than you were working for at the time and before you got hurt?

A. Yes, sir.

Q. All right, now, when you first came back to work, you said that you had some difficulty and couldn't do anything but light work; is that correct?

A. *Thats* right.

Q. How long was it after you came back to work before you begin to feel like doing your regular job out there?

A. Well, the steam engines went out of service about as fast as I got to feeling where I could navigate all on my own power normally.

Q. Now, getting back, if you will; you went back to work on April 3, 1950, and at the end of about six months working were you back doing pretty well your regular job?

A. No, sir.

Q. All right. When you had been back working a year after you went back to work April 3, 1950, a year from [fol. 69] that date, by April 3, 1951, were you back doing about your normal work out there?

A. I was trying to.

Q. And you weren't getting any complaint from your boss, were you, about the work you were doing?

A. No, sir.

Q. As far as your boss is concerned, your work has been satisfactory since you went back to work, has it Earl?

A. As far as I know.

Q. He has not complained to you about it, has he?

A. Very little.

Q. Well, nobody every gets by without a little complaint do they?

A. That-s right.

Q. Now, by the way, getting back to this July 12, 1949, when you got hurt; that was a hot summer day, wasn't it.

A. It certainly was.

Q. And, if you will bear with me, I think I can shorten this down some. Was there anything wrong with the lights, the lighting in there where you got hurt?

A. Not that I know of.

Q. Well, the lights were all right; you could see what you were doing?

A. That-s right.

Q. And the floor was all right, wasn't it?

A. Yes, sir.

Q. It was a good concrete floor?

A. Yes, sir.

[fol. 70] Q. Now, as far as the tools and equipment that you had to work with, there wasn't anything defective about them, was there, Earl?

A. No, sir.

Q. And in regard to—we will get to it in a little more detail in a minute; but that crane hoist that you swung it over out of, dropped it on the floor just about where you would have set it down if it had lowered it steady, didn't it, Earl?

A. Yes, sir.

Q. In other words, so far as that part of the operation was concerned, it got the job done?

A. Yes, sir.

Q. Now, Earl, there is one question that I may have misunderstood you on. Mr. McCord, your attorney here asked you about asking the boss--Williams is his name, is it?

A. Yes, sir.

Q. For some help a day or two before this accident happened——

A. Just a minute; I asked M. M. Johnson for more help*t*—the General Foreman. Mr. O. W. Williams is Assistant Foreman.

Q. Both of them were together, weren't they?

A. No, sir.

Q. Maybe I misunderstood you; I thought you said you asked both Johnson and Williams?

A. No; Mr. Johnson. I asked him in the presence of the [fol. 71] master mechanic, Mr. J. D. Dannenberg.

Q. Oh, I see.

A. Of Temple.

Q. What you were asking for, wasn't it, Earl, was to have a regular helper reassigned to you?

A. No, sir; I was asking for more help to do the work that we had in the round house without anybody assigning it to anybody; there was another pipe man on the job—on the day job, and we both had more than we could do and do just work, and get it out on time.

Q. Well, now, maybe we are not talking about the same thing, so you correct me if we are not. I took your deposition; Mr. Reed here took your deposition, didn't he?

A. Yes, sir.

Q. Were you under oath, just like you are today?

A. Yes, sir.

Q. And I asked you a lot of questions, didn't I?

A. Yes, sir.

Q. Didn't I ask you about three times if you had ever asked for help and it was refused you, and you said "No, *w*ir, I never was refused help?"

A. I don't remember that.

Q. What I am thinking maybe—I am going to read this to you in a minute—well, I will just read one of them to you now; on page thirteen, Mr. McCord of the deposition, and beginning at question 83. Now, Question 83 asks "Did you ever ask the foreman or the master mechanic for help [fol. 72] and have it refused you?" and you answer "No, sir," didn't you, Earl, in this deposition?

A. Yes, sir; I sure did.

Q. Now, it may be, and we are not tal-ing the same lan-

guage, Earl; when you were talking about asking for some more help on some of your regular job- there as a coppersmith, were you talking about some more help on some particular job that you might be called on to do?

A. I didn't ask for more help to remove the babbit- pot from the furnace on this particular day that I got hurt.

Q. Well, what I am getting at—let-s go back, I have got another series here and I will ask you about that. How many men were working down there in the shop on July 12, 1949? Give me an estimate?

A. I would say some forty or fifty men in and around it.

Q. I see. In helper classification?

A. Yes, sir.

Q. Some machinists?

A. Yes, sir.

Q. And two of you were coppersmiths?

A. Yes, sir.

Q. And there were some laborers—I call them "bull gangs" is that what you call them?

A. No, sir; I call them laborers, but I know what you mean.

Q. All right. Well, they were there available to do heavy work on different jobs at different times, weren't they?

A. Laborers in our shop are known as clean-up men, [fol. 73] supply men, and hostlers, hostlers helpers, and such as that; they move some heavy material and clean it; that-s all they move it for is for that purpose, for cleaning and returning it back to its respective places.

Q. Well, let-s go—let-s get down—what I am getting at, have you ever gone to Williams or Johnson, your two immediate superiors, and asked—they were your two immediate superiors, were they not?

A. Yes, sir.

Q. And asked them for help from the laborers or others to do any specific job and had it refused?

A. Yes, sir.

Q. What?

A. Yes, sir. He didn't specifically say that "you cannot have them" he would say "I don't know who I can get for you now, you will have to wait awhile." I have had that.

Q. Now, let-s get down to—that babbit- pot was your job, wasn't it, Earl?

A. Yes, sir.

Q. And as a matter of fact it had been cracked back for some time before this, hadn't it?

A. Several days.

Q. Longer than that, wasn't it?

A. Well, I don't remember how long; we had had some two or three different pots to crack.

Q. Well, you and some of the others had taken it out a time or two to braze it, hadn't you?

[fol. 74] A. Yes, sir.

Q. Well, from the time you first noticed—I am not talking about the time of your last batch, but from the time you first got it cracked until the time you got hurt, it had been some two or three weeks ago, had it not?

A. Yes, sir.

Q. During that time, you and others had taken it out of there—out of the furnace, on the ground there, and taken the babbit- out, and brazed it one or more times?

A. Yes, sir.

Q. About three times, wasn't it?

A. Yes, sir.

Q. And you had actually done that or supervised that job yourself, hadn't you, Earl?

A. Yes, sir.

Q. Now, I have a picture here which is a little bigger than yours. I think these were taken either the day you were hurt, or the day after.

A. Yes, sir.

Q. One of them has got Mr. Snow's face in it?

A. Yes, sir.

Mr. Hudson: I want to get them in order; I have got Defendant's Exhibits one to five here.

Q. I will not take them in order by number, but I am first handing you Defendant's Exhibit No. 1—no, first I hand you Defendant's Exhibit No. 3, which purports to be a picture of the old pot with the babbit- thrown out of it, and [fol. 75] Mr. Snow, the man that was helping you, holding it up so the camera can look down into it?

A. That-s right.

Q. Do you recognize that as being—or looks like the same pot and the same babbit-?

A. Yes, sir.

Q. It looks like the same pot and babbit-?

A. It sure does.

Q. All right, and you recognize Mr. Snow, do you not?

A. Yes, sir.

Q. It-s kind of a dark picture?

A. Yes, sir.

Q. I am going to hand you Defendant's Exhibit No. 5, which purports to be a picture of the furnace, taken down here from the end where the controls are for heating, with the new pot in it and the old pot over here to the right hand side, and wih tthe babbit- out flat on the ground.

A. Yes, sir.

Q. Now, that shows the old pot, the babbit-, and the furnace, doesn't it?

A. Yes, sir.

Q. All right, and this post sticking up here, I would assume was the one that holds the crane?

A. That-s right.

Q. Now, here is Defendant's Exhibit No. 1, which just shows the furnace with the babbit- laying over heer at the extreme right hand corner?

A. Yes, sir.

[fol. 76] Q. Another picture, Defendant's Exhibit No. 2, which is a picture of the end of the furnace with the babbit- over here at—I imagine that is that work bench, isn't it?

A. That is the work bench; yes, sir.

Q. And next picture, Defendant's Exhibit No. 4, which is another picture primarily of that old pot, taken along side of—is that the work bench?

A. No; that is the furnace with the new pot in it.

Q. With the new pot in it?

A. Yes, sir; you are looking at it from the reverse end, or the back end, I call it.

Q. I see.

A. The smoke stack end.

Q. Now, Earl, I will ask you if that pot, babbit- pot, and the removal of it was your job?

A. Yes, sir.

Q. And, were you a full rated man, getting the maximum rate for your job?

A. Yes, sir.

Q. In doing the work out there, I will ask you *or* any full rated man expected to know pretty well how to do the job?

A. Yes, sir.

Q. All right. As far as getting that pot out, who was in charge of that?

A. I was.

Q. Did the foreman tell you to take the pot out?

A. No, sir.

[fol. 77] Q. That was just part of your regular assigned work, was it not, Earl?

A. I knew that it was needed for that day because I had been instructed earlier in the day that they had to have that engine, and they damned sure couldn't get the engine without getting the pot changed, or making other provisions, and I don't know what it would be.

Q. Well, the old pot couldn't be used at all?

A. No, sir.

Q. What about some of those old pots out there, hand ladles, couldn't you have used some of them?

A. They was too small.

Q. Too small?

A. Yes, sir?

Q. All right, but any way, as far as this particular job was concerned, you were just told by the clerk—Mr. Bettis, I believe it is?

A. Yes, sir.

Q. That is was—or that the new pot had come in?

A. Yes, sir.

Q. And that they—the Store Department had gone after it in a truck?

A. Yes, sir.

Q. And nobody told you, none of the supervising employees, Williams or Johnson, or anybody else, told you how to do that job, did they?

A. No, sir.

Q. Whose responsibility was it to do the job?

[fol. 78] A. Mine.

Q. Who decided it was going to be done at that particular time?

A. I did.

Q. Who decided as to whether you were going to do it by yourself or to go ask for help?

A. I did.

Q. There were men around there that could have been found to help you, weren't there?

A. I suppose they could, but I had asked so many times and they hadn't been.

Q. All right. Getting back to this deposition, I am going to start on nineteen here and begin at question 133: "Did—" No, beginning at 133, and ask you—if I don't read that correctly, Mr. Deen—beginning at question 133 on page 19, in your deposition that was taken by the court reporter, Mr. Reed, who is taking your testimony now; you remember that?

A. Yes, sir.

Q. Question: "Was Earl Snow the only one working in that building with you?" and your answer was "Yes, sir." Did you say that?

A. Yes, sir.

Q. And was that true?

A. That-s true.

Q. Next question: "How far was it to where any other men ware working?" and you answered "Well, a block." Did you say that?

[fol. 79] A. Yes, sir.

Q. Well, is that true?

A. Yes, sir.

Q. One—or next question: "How many were working at that point?" answer "Eight or ten." Did you say that?

A. That was merely a guess.

Q. That-s right, I understand, but did you say that?

A. Yes, sir.

Q. Next question: "How many men were in that shop?" and you answered "Fifty or sixty men in that Department." Is that what you said?

A. Yes, sir.

Q. Well, is that approximately right?

A. Yes, sir.

Q. *Allright.* The next question: "How far would you have had to have gone to get help?" and*s*wer "As a general rule we had to take that up with the Department Foreman." Did you say that?

A. Yes, sir.

Q. Well, is that true?

A. Yes, sir.

Q. Now, turn on the next page, at the top of that page: Question: "How far was it to the foreman?" and*s*wer "Two block lengths." I don't think that is quite right, I think you said—or is that right?

A. Well, that-s about it; not far.

Q. It-s not far?

A. No.

[fol. 80] Q. But you mean there are two lanes in there and there is a block between them; is that what you mean?

A. No, sir; I mean that it-s just about the distance of two lengths of a block.

Q. I see——

Mr. Holloway: Wait, it says lanes, two block lengths is what he said, I presume?

A. Yes, sir.

Q. All right. Next question: "Well, did you go and ask him for some help?" and*s*wer "No, sir." Did you say that?

A. I did.

Q. Question: "There were men working there that you could have had assigned to help you, were there not?" And you answered "Yes, sir?"

A. Yes, sir.

Q. Did you say that?

A. Yes, sir.

Q. Is that true?

A. Yes, sir.

Q. Next question: "And you did not ask for more help?" answer "not on that particular job, no, sir." Was that your answer?

A. That-s right.

Q. And is that true?

A. Yes, sir.

Q. Next question: "You had not discussed that particular job with the foreman at all?" answer "No, sir." Did you say that?

[fol. 81] A. Yes, sir.

Q. And was that true?

A. Yes, sir.

Q. All right. Then "There were some men reasonably close the foreman could have assigned to help you?"

A. Yes, sir; but I don't know whether he would or not.

Q. Anyway, you didn't ask him and have him refuse?

A. No, sir.

Q. Now, getting back to getting that pot out, I think you had taken it out about three times before in the past two or three weeks, had you not?

A. Something like that.

Q. You knew how to handle that job, didn't you Earl?

A. I thought I did.

Q. Was there anyone out there that knew more about it than you did, or who had taken it out more times than you had?

A. No, sir.

Q. You were an experienced man, weren't you?

A. I thought I was.

Q. You were drawing money as one, weren't you?

A. That-s right.

Q. All right. And every decision about getting that pot out, and how it was done, was the decision of Earl Deen, was it not?

A. No; I wouldn't say that.

Q. All right; let-s just take them one at a time: The decision as to when to take it out; who made that decision?

A. I did.

[fol. 82] Q. All right. Let-s get back to that truck—stop right there—I will get to the rest of it. That truck that was going to get the other pot, was the warehouse, or store house truck?

A. Yes, sir.

Q. And you told your counsel you were hurrying so they would get back in time to help you?

A. Yes, sir.

Q. All right, now—but if they had gotten back before you got it out, they could have just set it on the floor, couldn't they?

A. Yes, sir, but they wouldn't have.

Q. What?

A. They wouldn't have?

Q. They wouldn't have?

A. No, sir.

Q. You didn't try and have them refuse, did you, Earl?

A. No, sir.

Q. All right. And if they had taken it on to the warehouse, that would have meant someone would have to go there and get it; is that right?

A. Yes, sir.

Q. It would not have been gone very long?

A. No, sir.

Q. It would just have meant a little bit more time?

A. Yes, sir.

Q. All right. Now, getting back to the decisions; the decision as to when to take it out; you made that cecision?

[fol. 83] A. Yes, sir.

Q. All right. Now, when you got over there and were using these hooks and hoists and crane; whose decision was it to do that? Who made that decision?

A. I did.

Q. All right, now, Earl, if I misquote you, please tell me; as to getting that babbit-, so far as that is concerned, you might have been able to break it with a sledge hammer or some other way, but you figured that the safest way was to turn it over?

A. That's right.

Q. All right; whose decision was that?

A. I don't remember, but as well as I remember we both talked about it.

Q. Who talked about it?

A. Me and Earl Snow.

Q. Well, Earl, who was in charge of removing that pot and the babbit-, you or Earl Snow?

A. I was.

Q. Well, anyway, you ag-ee that is the best way to do it, don't you, Earl?

A. Yes, sir.

Q. All right. Now, incidentally, after you got that old babbit- pot out, the furnace was empty where you could put the new one, in it, wasn't it?

A. Yes, sir.

Q. There wasn't any hurry about getting the babbit out [fol. 84] of the old pot right then, was there?

A. Nothing more than it had to come out, if the engine was got out that day.

Q. When we took your deposition, you told me, I think—let me find it here: if this is not right, we will look for it. You told me the truck had not come and you would have to get the babbit out sometime, and you just might as well do it right then?

A. That-s right.

Q. But as far as putting the new pot in, removing of that babbit from the old pot had nothing to do with it?

A. No, sir.

Q. You could have gotten a crane and hauled it out of there, out of the way, if you had wanted to, couldn't you?

A. If we had had time enough*t*, we could have, but our greatest trouble was short handed, and short time.

Q. Well, Earl, all that I am getting at is: this business of getting ready for the new pot, taking that babbit out of the old pot had nothing in the world to do with it?

A. Not a thing.

Q. It was ready?

A. That-s right.

Q. And as far as the hoist and all that, setting that thing down, taking it out and setting it down, that worked all right and nobody got hurt?

A. That-s right.

Q. Nobody got hurt until you started taking the babbit-out; is that correct?

[fol. 85] A. That-s right.

Q. And there was no hurry about taking the babbit- out?

A. Well, I thought there was.

Q. Just a minute ago I asked you if it wasn't true, the truck hadn't come and you didn't have anything else to do and you just thought you would get the babbit- out while you were waiting?

A. I thought I would be doing that so it wouldn't have to be done when the truck come, because when the truck come I wanted to put the new pot in and put the babbit- in it and get the fire under it.

Q. I see——

A. That was the sole purpose in getting it out, was to get the babbit- out where I could get it over in the new pot.

Q. There was lots of other babbit- out there besides what was in that pot, wasn't there?

A. No, sir.

Q. There wasn't several hundred pounds of babbit- out there all the time?

A. No, sir; there was plenty of times we was very short of babbit-; lots of times.

Q. Let-s take this specific time?

A. All right.

Q. Are you telling this jury right now—if you don't know, tell me you don't know; but are you telling this jury right now there was not plenty of babbit- out there besides what was in that pot on that day?

A. I don't know that there was.

[fol. 86] Q. Well, you don't know whether there was or wasn't. Earl, is this just about the truth, you were going to have to do it sooner or later, and you were there waiting on the truck, and you just decided to do it then?

A. That-s right.

Q. All right, now, whose decision was that?

A. Mine.

Q. The foreman did not tell you to do that at that time?

A. No.

Q. And if you had thought you needed more men—You gave it a tug yourself, didn't you?

A. Yes, sir.

Q. And you couldn't do much more than rock it?

A. I don't know that I rocked it.

Q. Well, anyway, something heavy like that, it takes quite a pull to tell whether you got ahold of it?

A. That-s right.

Q. All right, and Earl Snow came over and volunteered to help you?

A. That-s right.

Q. Had you gotten the babbit- out of the pot that way before—turned it up?

A. We had turned it over before and got it out, and we had turned it over before and it didn't come out.

Q. You had turned it over before when it had stuck in the crack?

A. That-s right.

A. If there was no crack in there, is it a fact the [fol. 87] babbit- contracts more than the steel and it comes out more easily?

A. That-s right.

Q. So, turning it over is what you had done on the other occasions to get the babbit- out?

A. That-s right.

Q. All right. And the pot weighed the same, didn't it?

A. Yes, sir.

Q. And the—was there ever*y* that much babbit- in it before?

A. Yes, sir.

Q. All right. How many men did it take to turn it over the other times?

A. Four or five, or five or six ahold of it; I have had as many as six ahold of it.

Q. Did anybody know that any better than Earl Deen?

A. No, sir; I don't suppose they did.

Q. And on the other occasions, during the past two or three weeks, when you changed it out, you had as many as five or six men helping you?

A. Yes, sir.

Q. All right. Nobody refused to let them help you, did they, Mr. Deen?

A. No, sir; I caught them when they was right there available, and I asked them and they helped.

Q. All right. Now, so—I think you said there were no tools out there designed to get that babbit- out, you say you couldn't get it out with a screw driver or chisel, or something of that sort?

A. You couldn't get the babbit- out of the pot with a [fol. 88] *a* screw driver because it was melted to fit the pot; it had been left hot and naturally f*r*omed to fit the pot.

Q. Well, now, as to the way or method—I am asking as to the time—that particular time to get the babbit- out; that was your decision, and you said it was, and now as to the way or method of getting it out, who made the decision as to how to get it out?

A. I don't know whether it was me or Mr. Snow.

Q. Did Mr. Snow tell you how to do it?

A. I don't know that he did and I don't know that he didn't; but he walked over there and I know that we did discuss it.

Q. Whose responsibility was it? As to how to get it out?

A. Well, I suppose that it was mine, but it is very often that you will confer with your fellow man and get his opinion on anything.

Q. Well, in any event, you either made the decision or you concurred in it, didn't you—agreed to it?

A. Yes, sir.

Q. No foreman told you to do it that way?

A. No, sir.

Q. All right; now, actually you came up with that pot, and you and Snow came up with it, you pulled with your left hand and he with his right and just before you came up with it, one of you said "look out for your toes, that might crush it," or something of that sort?

A. Yes, sir.

Q. Then you knew if that babbit- fell out it could hurt [fol. 89] you and hurt you bad, didn't you?

A. Yes, sir.

Q. And you wanted it to fall out as a metter of fact, didn't you?

A. Yes, sir.

Q. That was what you wanted?

A. I wanted it out.

Q. And whether it fell out, or slumped out, you didn't know which way it would come out?

A. No, sir.

Q. And the strain in getting up was over before it fell on your foot?

A. Yes, sir.

A. As a matter of fact, these extra men would have been

helpful to you only in getting it up-right; is that right, Mr. Deen?

A. Yes, sir.

Q. And whether there had been five or ten men there would not have had anything to do with the babbit- falling out of the pot?

A. No, sir.

Q. It would have fallen out if the whole shop had been there with you?

A. It might have fell on two of us.

Q. Yes, and your foot might have been in the same spot that it was if there had been two other people helping you with it?

A. No, sir.

[fol. 90] Q. Well, now, where we differ again, I thought I asked you about that; I hate to keep going back to this, but this is all that I know as to what you know about this, Mr. Deen. I am turning you to page 23, question 173, and starting with question 173 on page 23 of your deposition and I am, going to read the question and your answer to it; question 173: "All right, now, if you had as many as four people lifting on that pot, where would your leg have been?" answer "On the other side of it, but four people, I don't believe four people could get around it in order to do much liftin-." Did you answer that?

A. Yes, sir.

Q. Is it true?

A. As far as I know.

Q. Then question 174: "That is what you think, as a matter of fact, you think it was a two man job?" to which you answered: "Almost a two man job, a third man could be there and help." Did you answer that?

A. Yes, sir.

Q. Is it true?

A. Yes, sir.

Q. Question 175: "And you think about all a fourthe man could do would be to watch it?" and you answered: "That-s right." Was that your answer?

A. Yes, sir.

Q. Well, is that true?

A. Yes, sir.

Q. Question 176: "You think a third man could get there [fol. 91] and help lift a little with two men in about the same position that you were in?" and you answered "Yes, sir," and question 177: "And after you had gotten it up, you think a third man or a fourth man could not have had anything to do with it falling out?" and you answered: "No, sir." Then Question 178: "In your opinion it would fall out if six men were there?" answer: "Just as apt to." Question 179: "And you don't know but what your leg would have been in exactly the same shape if there had been six men helping?" and you answered: "That-s right." Now, was that your testimony in your deposition?

A. Yes, sir.

Q. Is it true?

A. Yes, sir.

Q. All right. Let-s get back to these decisions. Whose decision was it to put your foot where that would fall, if it fell it would fall on it?

A. Mine.

Q. All right, sir. Now, being fair, Mr. Deen, with this jury, there wasn't anything dangerous about that, if you kept your feet out of the way, was there?

A. It didn't look like it.

Q. All right. And, if your foot had been back, it would have fallen out just the way you wanted it *ot,* right on the pavement, on the paved floor of that shop, wouldn't it?

A. Yes, sir.

Q. All right. Then the decision *asto* putting your foot in the way was Earl Deen's decision, was it not?

[fol. 92] A. I suppose it was.

Q. Well, did Mr. Snow tell you how to put your feet, or the foreman or anybody tell you how to put your feet?

A. No, sir.

Q. All right, sir——

A. And nobody didn't tell me to move it.

Q. Nobody told you to move your foot or to leave it there?

A. That-s right.

Q. All right. The truth about this, Mr. Deen, is that except for that one moment of forgetfulness, the kind of thing that any man could do, you or me or anybody, there

wasn't anything wrong with the way that job was done that day, was there?

A. It don't look to me like there was.

Q. All right. Outside of that one moment of forgetfulness to get your foot in the way, that was the only thing that was wrong that day; is that right?

Mr. McCord: I object to that, your Honor, the certain words of forgetfulness; Mr. Deen hasn't testified that he forgot anything.

Court: I overrule the objection.

Mr. McCord: Note our exception.

Q. There wasn't anything wrong with that operation out there that day, outside of your foot being in the way when that babbit- *b*ell out?

A. So far as I know.

Q. There wasn't?

A. That-s right.

[fol. 93] Q. Now, Mr. Deen, what were you doing out there last week?

A. Out at the shop?

Q. Yes?

A. We didn't do so awful much work, we had a good many diesels and had a government inspector that caused some unusual work to be done.

Q. But you were still working out there on a regular shift, were you not?

A. Yes, sir.

Q. And you have not been demoted or anything of the sort?

A. No, sir.

Q. And we stipulated about this six hundred——

A. I was thinking it was $635.00, but it was, but it was something over six hundred—between six hundred and six hundred and fifty.

Q. If it shows to be $650.00, would you concede that is correct, Mr. Deen?

A. Yes, sir.

Redirect examination of Earl R. Deen.

Questions by Mr. McCord:

Q. This $650.00 has to be repaid to the retirement board, doesn't, Mr. Deen?

Mr. Hudson: That is a matter of law, your Honor, for the court to pass on that, and I object to it.

Court: Overruled.

Mr. McCord: Your honor, he has a right to clear that up——

[fol. 94] Mr. Hudson: Now, wait a minute; if the court wants to tell the jury what the law it, I don't care, but he doesn't have to repay it except in one particular way; and that is my objection to it.

Court: The court has overruled the objection.

Mr. Hudson: Note my exception.

A. What was the question, please?

Q. This $650.00 has to be paid back to the Railroad Retirement, does it not?

A. If I understand right, that was not paid by the Railroad but was paid by the Railroad Retirement, and it does have to be paid out, if I get settlement for as much as enough to pay it.

Q. Now, Mr. Deen, with reference to lifting this pot the way that you did; you did demonstrate to the jury the way you and Mr. Snow got in front of it and braced yourself with one hand and pulled it toward you?

A. Yes, sir.

Q. Was there any other way to lift that pot and to turn it that way; that is, for two men to do it other than that way?

A. Two men was overloaded in doing that and we had tried before to turn it away from us for safety measures.

Q. And is that why you had to get in front of it?

A. That-s true with only two of us were able to pull more than we was able to lift and push.

Q. Now, Mr. Deen, even though that you did, out there on [fol. 95] November 12, 1949, you did, pursuant to instructions and in pursuance to your job, you did——

Mr. Hudson: Wait a minute; your Honor, that is leading and suggestive.

Court: I sustain the objection.

Q. What you did out there on July 12, 1949, Mr. Deen, was *was* your job, was it not?

A. That-s right.

Q. Was it your job to do, whether you were instructed by the foreman or assistant foremen, or any supervisor or not?

A. I considered I had a job down there; I had the job to do just like the average human being does around home; I don't have to be told every move that I make, because I assume the responsibility of—a certain amount of that is mine and solely mine, and therefore, I continue to try to keep my part of it going to the best of my knowledge without being told by the foreman.

Q. Now, Mr. Deen, Mr. Hudson asked you on page 13 of your deposition, question 83: "Did you ever ask the foreman or master mechanic for help and have it refused you?" and your answer to that question was: "No, sir." And just above that on question 82: "Did you ask your foreman for help?" and you answered "Yes, some ten days before I asked him for help in the presence of the master mechanic; that was on another job, and he looked me in the eye and said 'Earl, we will just have to do the best we can' " is that your answer?

A. That is true.

Q. You said that in your deposition?

[fol. 96] A. Yes, sir.

Q. Just about the question that counsel asked you?

A. Yes, sir.

Q. With reference to question 83, Mr. Deen, in view of your answer to question 82, what did you mean when you answered "No, sir?"

Mr. Holloway: Wait a minute, your Honor, the answer speaks for itself.

Court: I sustain the objection.

Mr. McCord: Note our exception.

Q. Now, Mr. Deen, could you have lifted the babbit- and removed it with the hoist?

A. I know of no way.

Q. Was there any other equipment in the shop that you

could have lifted that babbit- with by hoist or otherwise, or by crane or otherwise?

A. I never seen it.

Q. Now, Mr. Deen, it is true, according to your answers to Mr. Hudson's questions, that you did make the decision to take the pot out, is that right? And to take the babbit- out of the pot; is that right?

A. Yes, sir.

Q. And it is also true that you decided to take it out at that time?

A. Yes, sir.

Q. And those were your decisions?

A. Yes, sir.

Q. But they were also in line with your employment?

[fol. 97] Mr. Hudson: Just a minute, we object your Honor; in the first place its leading and suggestive, and in the next place it is an invasion of the province of the jury.

Court: Overruled.

Mr. Hudson: Note our exception.

A. What was the question?

Q. Those decisions were in line with your employment?

A. Yes, sir.

Q. And with reference to those decisions, they were governed by the fact that——

Mr. Holloway: Just a minute; we are going to object to him leading the witness on those and phrasing the reasons that he might have had for such decisions.

Court: I sustain the objection.

Q. All right, Mr. Deen, what was your reason for making your decisions?

A. It was in line with my duties; my job; my regular routine.

Q. And were there any other reasons, other than your duty and your routine?

A. I wanted to do it at that particular time, because I knew that I was shorthanded, and I had in mind getting the benefit of the Store Department men on the truck to help lift and carry the new pot and put it in place. They had—I thought they had assumed to stop in the door and

help me unload it in front of the furnace as to return and unload it by themselves on the platform, and probably locate it.

Q. Now, what authority does Mr. W. J. Bettis have, the [fol. 98] man who told you about the new pot being in that morning?

A. So far as I know he didn't have any authority and I thought that all he had in mind was the shape I was in and that we——

Mr. Hudson: Now, your Honor, that is not responsive in the first place, and what this witness thought——

Court: I sustain the objection to what someone thought.

Q. Who d-es W. J. Bettis work under?

A. The general foreman, who was at that time Mr. M. M. Johnson.

Q. Who was he directly responsible to?

A. Mr. M. M. Johnson.

Recross-examination of Earl R. Deen.

Questions by Mr. Hudson:

Q. The store crew on the truck, you were wanting them to help you put the new pot in, where the old pot came out from; is that right?

A. Yes, sir.

Q. What about—did you expect them to help you empty the babbit-?

A. No, sir.

Mr. McCord: Did you get any help from them?

A. No, sir; they hadn't got there.

Mr. McCord: Now, Mr. Deen, if you had had another man or two men more to help in lifting that pot, would your foot likely to have been in the position it was when injured?

A. If I had had enough help, I would have turned it away from me.

[fol. 99] (After the court having adjourned on the evening of April 12, 1954, thereafter on the morning of April 13, 1954, at 9:00 A. M., court reopened and the trial proceeded as follows:)

Earl R. Deen, recalled in his own behalf, testified as follows:

Direct Examination

Questions by Mr. McCord:

Q. Now, Mr. Deen, with reference to the tools that were furnished to you in the shop, whose duty is it to furnish to you the proper and adequate tools to do the job with?

Mr. Hudson: We object to that because it is a matter of law for the court, and we object to it *is* asking a question of law of this witness here.

Court: I sustain the objection as to whose duty; he might testify as to who customarily furnishes the tools.

Q. All right; who customarily furnishes you the tools and equipment to do your work with?

A. Well, in the work there the Company furnishes us the tools. We don't have to furnish our own tools.

Q. And when you talk about the Company, what particular supervisory officer is responsible for that?

A. Well, the general foreman or the assistant foreman bring the tools, as a general rule, or send the tools, or have them brought, or sees that they are made, or takes care of the tool situation.

[fol. 100] Q. Now with reference to the equipment and tools which you had available out there, in the shop at the time and on the occasion in question, was there any other type of tool or equipment, other than what was made available to you that could have done this job?

A. Yes, Sir. I think I could have designed within a period of a short time, designed several tools that would do the job, even by myself.

Q. What particular tool or equipment could have been furnished you that was not furnis*y*ed you at the time and on the occasion in question?

A. Well, right on the spur of the moment a person could have taken two C clamps with a chain attached to both, clamping them both on the same side of the pot, at each end, using a chain hoist to hook into the chain in a loop, lifting the pot up gently on its side—of course it would

have balanced straight up; but you could have been on the back side of it and one end would have tilted it away from you very easily, and lowered it very slowly with the other hand. The hoist is a heavy enough hoist that you could lift much more load than that with one finger, if you could hook the finger in the chain link; but it operates very easy under that amount of load; and by tilting the pot away from you, if the babbit- falls out, or the pot fell over, it would fall on the floor and not on you.

Q. And were those clamps and equipment that you mention and could have handled this safely, available to you at the time and on the occasion in question?

[fol. 101] A. As far as I know there are none there now.

Q. Were they furnished to you by the defendant railway company at the time and on the occasion in question?

A. No, sir.

Q. And where would such equipment come from?

A. The supervising officer would have designated it, according to your instructions, or as a general rule the tools were—that were home made were designed by the supervising officer. Sometimes the man might have an opportunity to help the supervising officer to design it and sometimes he didn't.

Q. All right, now, with reference to your supervising officer, who do you have reference to?

A. Mr. M. M. Johnson, or O. W. Williams either; but O. W. Williams—I don't know whether he assumes the responsibility, or whether it is his job, but as a general rule he more or less takes care of that work.

Q. All right, now, did Mr. Williams, or Mr. Johnson, know that you, as the usual and customary thing, did handle this pot, lift it out of the furnace and empty the babbit- out of it?

A. They knew that it had been done before this time, a number of times, and they had not made any attempt to—as far as I know, or at least they had said nothing to me about making a tool to handle it with.

Q. And they knew, did they not, that you had handled that and empt-ed it on some three or four occasions prior to this time?

A. They did.

[fol. 102] Q. And they knew, did they not, in the realm of their supervisory capacity that when this pot had babbit-in it, it was tremendously heavy?

A. They did.

Q. And they knew, did they not, that the pot, when it had babbit- in it, it was heavier than one man could handle?

A. They sure did.

Q. Now, with reference to your supervisory personnel, Mr. Dean, how often did they come in the shop there where you worked?

A. Sometimes every little bit, and sometimes maybe not at all in a half a day.

Q. Now, who ordered this melting pot—this new melting pot that you were to install?

A. I asked the general foreman, or the assistant foreman and I don't remember which. Well, I didn't ask them; I told them that the pot was busted and that we were unable to repair it and it looked like we were going to have to have one and that we would have to have it right now; our work is piling up on us and we can't use the old one.

Q. And then who ordered it?

A. I don't know; that is out of my jurisdiction. I know that a lot of that is handed over—the order is handed to the clerk and he has to have a form number—number so and so, and that is to be turned in——

Q. Well, who—who customarily approves such requisitions or orders?

A. The general foreman.

[fol. 103] Q. The general foreman?

A. Or the assistant foreman either.

Q. And at this time, and on this occasion in question, the melting pot so ordered was approved either by the assistant foreman or the foreman; is that correct?

A. As I remember it, it was ordered direct—not in the weekly shipments. We have what we call a weekly car load of material that comes in every week; and that usually comes in on Friday, and that is placed and spotted at the store room, through a regular routine of shipment; but this particular pot was needed bad enough that it was ordered direct and shipped to the store room, to the freight depot, and that was why the store department had to go to the freight depot to pick up this one particular pot.

Q. And at the time and on the occasion in question, Mr. Deen, beside- you and Mr. Snow, who else was in the shop?

A. No one.

Q. And how far from the shop were the other personnel that were working in the yard at that time?

A. I couldn't say positive, because I don't know; they could have been in the end of the round house near the machine shop, within some 75 or 100 yards. They could have been in the far end of the round house, and they would have been some 250 yards or better. There were men working and sometimes they were all in one end of the house and sometimes they were in the other end of the house. Sometimes they were in the machine shop, and sometimes in different locations.

Q. On this particular morning, those supervising per- [fol. 104] sonnel came into the shop; is that correct?

A. Not while I was in there.

Q. And the only contact that you had with the supervising personnel was that morning when Mr. Williams—was it?

A. Yes, sir.

Q. Told you that that engine had to get out?

A. Yes, sir.

Q. How long had you been on the job at the time that the accident happened?

A. From the beginning of my railroading?

Q. Yes, sir—no, no; just that morning?

A. Approximately two hours; maybe a few minutes more than two hours that I had been on duty.

Q. And how long had it been since you had seen any of your supervising personnel from the time you had talked to Mr. Williams that morning about getting the engine out?

A. It was the day before; I couldn't say what time of day that it was; it might have been right at four o'clock, or it might have been right after noon, or it could have been in the morning.

Q. Now, to clear up that issue, when was it that Mr. Williams told you that the engine had to get out?

A. Approximately nine o'clock.

Q. The morning of the accident?

A. Yes, sir.

Q. And from that time until the accident, you did not see any of your supervising personnel?

A. No, sir.

[fol. 105] Q. Did you see any of them there at the time of your accident?

A. No, sir.

Q. When was the next time that you saw them?

A. Mr. Johnson, M. M. Johnson, came to my side in the hospital and talked with me.

Q. In the hospital?

A. Yes, sir.

Q. Did you know where they were at the time of your accident?

A. No, sir.

Q. About how long did you remain on the ground, or in the shop, after being injured, before the ambulance came for you?

A. That would be a hard question to answer.

Q. Well, approximately, was it ten minutes, fifteen minutes, or about how long?

A. Well, I would say fifteen minutes.

Q. Now, Mr. Deen, with reference to the taking of this babbit- out of that pot, did your supervising personnel, at any time prior or subsequent to this accident ever advise or instruct any different way to take the babbit- out?

A. No, sir.

Q. And they were familiar with the way you were taking it out on these other two or three occasions?

A. So far as I know, they were.

Q. Who could have made any additional tools that were needed in the ship there, or ordered them; what branch—[fol. 106] or what department?

A. A lot of the tools are made by the blacksmith, and again lots of the tools are ordered. If it is just a common every day wrench, why, as a general rule it is made by the blacksmith; but if it has to be a motor-driven, or air-driven, or something like that; it is ordered.

Q. Now, Mr. Deen, with reference to removing this babbit-, tell this jury, looking at this chain hoist that is here, why you could not have used this hoist?

A. Well, there was no way to attach the hooks to the

babbit- alone; you could use that chain hoist if there was a tool made to turn the babbit- over, and out of the pot, or turn the pot over and let the babbit- out.

Q. Well, the attachments to that chain hoist, would they, or would they not have turned that babbit- pot over?

A. There was no way to latch them on to it, or to make them secure to it.

Q. All right, explain to the jury what would have been necessary to have made that hoist workable in this instance, if it could be made workable?

A. You could use the hoist, and you could use the hooks, by making a special tool for the hook to be clamped onto the side of the pot; making an "I" or a "C" clamp with an I in it for the hook to clamp in; or you could make the C clamps and used chains between them to clamp onto it, and then you could use the hooks, or you could have laid the hooks aside.

Q. With those C clamps and with that attachment or [fol. 107] those attachments you have describe- here—or were those attachments available to you at the time of that accident?

A. No, sir.

Q. Did the Foreman, or the assistant foreman, know that you were going to take that pot out and install a new pot on that occasion?

A. I don't know definitely, but I am pretty sure——

Mr. Hudson: Just a minute, your Honor, if he knows, all right, he can so testify, but he is not entitled to guess and to speculate about it. We object to it, unless he knows.

Q. Well, do you know, Mr. Deen; the question is: do you know whether or not——

A. The general foreman should have known, but——

Mr. Hudson: Well, wait just a minute; that's what we are objecting to, your Honor, unless he knows; and we now move to strike that answer on the ground its not responsive.

Mr. McCord: We will rephrase the question this way, counsel.

Court: I sustain the objection.

Q. Should, in this particular instance—should the gen-

eral foreman, or the assistant foreman, should they have known that——

Mr. Hudson: That is just what we are objecting to it the court please; we are objecting to this witness testifying to what they should know, or should not have known.

A*a*. They should know.

Mr. Hudson: Now, just a minute there——

Court: I sustain the objection.

[fol. 108] Mr. McCor*t*: Your Honor, note our exception on that question, because on a legal theory the supervising personnel should have known.

Court: I sustain the objection to this witness testifying to it, unless he knows they did know.

Q. Now, was Mr. W. J. Bettis in any supervising capacity?

A. No, sir.

Q. And, I believe you testified that you worked directly under the general foreman? Or that Mr. Bettis did?

A. Yes, sir, Mr. Bettis was directly under him.

Q. And in his office?

A. Yes, sir.

Q. And it was he, was it not, who came to tell you about the new pot having arrived?

A. *M*e merely came by on his way to his office from his automobile, walking or what not, or he had been out one side and came by where I was at, with the general foreman, walking side by side, and stopped and told me.

Q. With the general foreman?

A. Yes, sir.

Q. The general foreman was with him?

A. Yes, sir.

Q. Was the general foreman there with him when he told you that?

A. Yes, sir.

Q. And that is Mr. M. M. Johnson?

A. Yes, sir.

Q. Did he make the statement then ther- in the presence [fol. 109] of the general foreman?

A. Yes, sir.

Q. In such that the general foreman could hear it?

A. Yes, sir.

Cross-examination of Earl R. Deen

Questions by Mr. Hudson:

Q. Mr. Deen, these seat clamps you are talking about, have you—or did you ever use them these other times when you removed the pot?

A. No, sir.

Q. Did you ever discuss the need for them with Williams or Johnson to remove this pot?

A. No, sir.

Q. As a matter of fact, that is just some theory of yours that you have developed recently, isn't it, Mr. Deen?

A. No, sir.

Q. Well, when I took your deposition, I asked you if there was any kind of a device that would handle that, and you told me not that you knew of; didn't you

A. I didn't tell you that I couldn't have figured out one if I had had to figure out one.

Q. All right, did you tell me if you tried to clamp on to it, it would be dangerous, and might bust that cast iron and damage or injure somebody?

A. It is possible, but not probable.

A. All right. Les-t turn to 25 of your deposition, and [fol. 110] let-s go back aways—well, we want to go back to page 24 to get the whole sense of it. I will start with question 180 and we will get the whole sense of it; starting with question 180 on page 24; question: Why couldn't you have lifted this babbit- with the hoist? Answer: We did not have the hooking arrangement to put it on; you answered that did you not?

A. Yes, sir.

Q. Question 181: Is there any other equipment or some other way, other than just having two men handle it; and you answered: "No, that is all I know" did you answer that?

A. Yes, sir.

Q. Question 182: Do you know of any better way to do it now, after you got hurt? Answer: "Yes, just leave the damned thing in there" did you answer that?

A. That is the best way in the world to do it.

Q. Question 183; Well, if you had it to do over, would

you do it the same way? and you answered: "No, sir; not I" and the next question: I don't think you got my question, if you had to do it over would you have to do it about the same way? and you answered: "Yes, sir, if I had to" and then question 185: In other words, you would be forced to do it, but if you had to do it again, you would do it—you would not do it willingly? and you answered: "No, sir" and then 186: If you were ever forced to do it again, you would be awful careful where your foot was? and you answered: "I would be careful where everything was" did you say all of that?

A. I sure did.

[fol. 111] Q. Now, I want to ask you this question: if you were telling some one how to do it today, and the date of this deposition was the 7th day of August, 1952; I want to ask you this question: if you were telling someone how to do it today; how would you tell them to do it? and you answered: "Well, I never thought about that, but I am sure if I was telling somebody else how to do it, I would tell them to keep everybody away from it" did you answer that?

A. Yes, sir.

Q. Next question: That was because you were hurt, it hurt you? and you answered: "That*s* right" did you make that answer?

A. Yes, sir.

Q. Question 189: Because of the size of the thing and the way it was built, the only way to get that babbit- out was to have two men get hold of it and turn it over; a third man might help, but he would not be of any help on lifting? Answer: "Well, a man might build a vice clamp on it" and you answered that, didn't you-

A. Yes, sir.

Q. Question: Do you know of any device like that in use? answer: "No, sir" did you say that?

A. Yes, sir.

Q. Question 191: You know of no device that would hold it? Answer: We had thing*d* to lift so it could not turn or roll, that is, so long as your hoist stuck so that you can get it turned over and get the babbit- out, but you are likely

[fol. 112] to throw a piece of cast iron throuth it; it is dangerous" did you answer that?

A. Yes, sir.

Q. Is that true?

A. Yes, sir.

Q. Now, let-s get back to the matter of clamps; you had never asked anybody for clamps?

A. No, sir.

Q. And during the preceding two or three weeks, you never thought you needed them, did you, Earl?

A. I knew we needed something, but we didn't have it.

Q. Well, you th*gouth* to ask for any clamps, had you?

A. At that particular time, I seldom had time to ask for anything.

Q. Well, anyway, you never asked for any clamps did you?

A. No, sir.

Q. All right. Now let-s turn back here to page 12 of your deposition, about this clerk coming by; I think that is where it is. Starting at the bottom of page 11, with question 73 and the first question is this: Had the new pot already arrived? Answer: "Yes, sir" and question: How did you find that the new pot had arrived: Answer: "The clerk had been to get the mail and he came by and said 'your babbit- pot is in the depot and they have gone after it' " did you say that?

A. Yes, sir.

Q. And you didn't say anything about the foreman being with him, did you?

A. No, sir.

[fol. 113] Q. And question 75: What did that mean to you? answer: "It meant that I was short of help, and if I could get this old pot out of there in time, get it out by the time they got there with the new pot, they would help me get the new pot in; otherwise, they would take it to the store room with them, and that would mean that I would have to get it by myself and put it in by myself" did you answer that?

A. Yes, sir.

Q. Question 76: And you figured if you were ready for it when it arrived there, you would have assistance in

installing it? answer: "Yes, I knew that I could not do it by myself, and I didn't know where I could ever get help to get it and put it in, if I didn't have it ready for them to install when they got the with it" did you answer that?

A. Yes, sir.

Q. Question 77: But you knew that you would get help sooner or later to get it down? and you answered: "Yes, sir" did you make that answer?

A. Yes, sir.

Q. Was that true?

A. Yes, sir.

Q. You did know that you would get help sooner or later?

A. Yes, sir.

A. In other words, you knew that they were not going to let this furnace be shut down indefinitely waiting to get the new pot installed? Answer: "They never have, but sometimes it looked like we was going to have to go to [fol. 114] town and get help" did you answer that?

A. Yes, sir.

Q. Next question: What I am getting at is this: if you had not done it at that particular hour or minute, and let the pot go up to the warehouse, you would still have had to go through the same procedure, that is, you would still have had to take the old pot out, and put the new one in? and you answered "Yes, sir" did you make that answer?

A. Yes, sir.

Q. Did you say that?

A. I sure did.

Q. In other words, it would have meant a few minutes, or the difference would have been the delay in getting help; is that right?

A. Yes, sir.

Q. Now, Mr. Deen, the doctor down at Temple, at the Scott and White Hospital, looked after your le/ while you were down there, did he not?

A. Yes, sir.

Q. They re-set it?

A. As far as I know.

Q. Somebody did.

A. They knocked me out.

Q. Well, then, you have seen Dr. Cadenhead?
A. Yes, sir.
Q. What other doctors have you seen?
A. Well, I seen another doctor at Temple.
Q. Was he connected with Scott and White Hospital?
[fol. 115] A. Yes, sir.
Q. Have you seen any other doctor here in Brownwood other than Dr. Cadenhead?
A. Well, he recommended a new foot doctor here in Brownwood; but he didn't stay here but a very short time, but I went to see him and he readjusted the shoe that was made in Temple to fit my foot. A built up shoe.
Q. You don't wear that built-up shoe now?
A. No, sir.
Q. Now, what other doctors did you see?
A. I saw Dr. Legg in Dallas.
Q. When did you see him?
A. I seen him in fifty-one, I believe, as well as I remember.
Q. Your attorney, Mr. McCord, recommende- that you go to see him, did he not?
A. Yes, sir.
Q. All right, now; you have seen Dr. Cadenhead a couple of times in the past four years; you heard him testify you had been in his office several times during the last four years?
A. Yes, sir.
Q. All right; we have Dr. Cadenhead, and we have the Temple doctors and the foot doctor, you said you didn't see him very often; Dr. Leg-, in Dallas that Mr. McCord recommended to you, and this Dr. Branch who has testified here yesterday?
[fol. 116] A. Yes, sir.
Q. Now, what other doctor have you seen?
A. I have seen Dr. Paul Hamond here in town.
Q. All right?
A. And I saw Dr. Byars of San Angelo.
Q. All right. What other doctor?
A. That's all, I believe.

Mr. Hudson: I believe that will be all.

Redirect examination of Earl R. Deen

Questions by Mr. McCord:

Q. Now, Mr. Deen, with reference to questions counsel has asked you about your deposition about Mr. Bettis; did counsel ask you in that deposition whether or not Mr. Johnson, the foreman, was present?

A. No, sir.

A. Now, with reference to your deposition that counsel asked you about on page 24, and question 181: Is there any other equipment to lift in some other way other than having two men to handle it? and your answer was "No, that is all I know" now, were you or not talking about the equipment that was in existence and available to you at that time?

Mr. Hudson: Now, just a minute; the answer speaks for its*lef*, your Honor.

Mr. Holloway: And further the question is leading and suggestive.

Court: I sustain the objection.

[fol. 117] Q. All right. What equipment were you talking about in your answer to that question?

Mr. Hudson: The some objection, your honor.

Court: Overruled.

Mr. Hudson: Note our exception.

A. The equipment that was available at that present time.

Mr. McCord: That*s* all.

Recross-examination of Earl R. Deen

Questions by Mr. Hudson:

Q. When I asked you about designing something, all that you could think of was the clamps and that would be dangerous, wasn't that your testimony?

A. Yes, sir.

Q. And yesterday you testified that you had moved that pot several times?

A. Yes, sir.

Q. And that you knew more about moving that pot than anybody in the shop; now, do you wish to change that?

A. I don't think I said I knew more about it than anybody in the shop.

Q. I believe you said you knew as much about it as anybody in the shop?

A. Well, let it go at that.

Mr. Hudson: That's all.

Redirect examination of Earl R. Deen

[fol. 118] Questions by Mr. McCord:

Q. With reference to that equipment being dangerous; what equipment did you have reference to?

A. The deal—any deal would be dangerous without it was securely fastened and put on in such a way that it would be absolutely secure.

Earl H. Snow, called as a witness for the plaintiff, was sworn and testified as follows:

Direct examination

Questions by Mr. McCord:

Q. Will you state your name, please sir, to the jury?

A. Earl H. Snow.

Court: Were you sworn yesterday with the other witnesses?

A. I guess I was; I was right out there with my hand up.

Q. Where do you live, Mr. Snow?

A. At 1621 Fifth Street.

Q. Here in Brownwood, Texas?

A. Yes, sir.

Q. How long have you lived there?

A. About ten years.

[fol. 119] Q. For whom are you employed?

A. By the Santa Fe.

Q. And how long have you been employed by the Santa Fe?

A. Well, with the exception of nine months, about ten years.

Q. And were you so employed on or about the 12th day of July, 1949?

A. Yes, sir.

Q. What shift were you working on, on July 12, 1949?

A. From eight to four—day-light.

Q. And what were you employed to do on that occasion?

A. I was blacksmith helper; but I was acting blacksmith at that time.

A. Was that because of the fact somebody was on a vacation at that time?

A. Yes, sir; the regular blacksmith was on vacation.

Q. Were you in the shop on the 12th day of July, 1949, when Earl Deen was attempting to empty some babbit- from a melting pot?

A. Yes, sir.

Q. Where were you when your first noticed him doing that job, Mr. Snow?

A. I was about 45 or 50 feet from him, back in the shop.

Q. What did you first notice Mr. Deen doing?

A. He was attempting to turn the babbit- out of the pot by himself.

Q. Was the babbit- pot, at that time, on the ground, [fol. 120] and out of the furnace?

A. Yes, sir.

Q. Well, was Mr. Deen being successful in doing that?

A. No, sir; he was not.

Q. And what did you do at that time, after seeing him attempting to do that?

A. I walked over and told him to wait and I would give him a hand.

Q. And did you then help him?

A. Yes, sir.

Q. How did you first try—first start in to empty the babbit- from that pot?

A. As well as I remember, we tried to turn it to the back side away from us.

Q. Were you able to do that?

A. No, sir.

Q. Why were you not able to do it?

A. Well, I suppose because it was too much weight.

Q. Too much weight?

A. Yes, sir.

Q. Now then, what did you do after trying that method?

A. We moved to the other side and tried to turn from the front side.

Q. You tried to turn the front side toward you?

A. Toward us.

Q. And—Mr. Snow, will you step down here in front of the jury box, please sir, and taking this chair as the pot when it was turned over; will you demonstrate to the jury [fol. 121] where you were and where Mr. Deen was in attempting to empty that pot?

A. Well, that pot was similar to this; the work bench was on the left and I had my right hand occupied on the back side, bracing with my left hand; and Mr. Deen was on the other side, braced against the furnace.

Q. Now, did that take considerable strength, or were you able to lift it?

A. Yes, sir, it took a lot of strength.

Q. And was that the reason why you had to brace yourself?

A. Yes, sir; that was one reason.

Q. And what other reason?

A. Well, safety measures, I suppose, although I could stay out of the way of it.

Q. How far did you bring it up?

A. About half way up.

Q. About half way?

A. Yes, sir.

Q. Then what happened?

A. The babbit- slipped out of the pot.

Q. The babbit- slid out of the pot; then what happened?

A. It caught Mr. Deen's leg.

Q. Mr. Deen was on the other side of the babbit- pot?

A. That's right.

Q. And at that time, Mr. Deen was bracing himself with his hand and his leg on his side and you were bracing yourself on your side, and both of you were pulling at the same time?

[fol. 122] A. Yes, sir.

Q. Do you know what that pot would weigh, with the babbit- in it; approximately?

A. I would say between seven and eight hundred pounds.

Q. And then after Mr. Deen was hurt, after the babbit- spilled out and caught him, what did you do?

A. I picked the babbit- up and asked him if he could move his leg, and he said "no" and I took my right foot and pushed his leg from under the babbit- and than I let the babbi*d*- back down to the floor.

Q. Did it take both of your hands in doing that?

A. Yes, sir.

Q. And a lot of strength?

A. Well, I don't know; I was excited at the time, but I went back afterwards and tried to lift that babbit and I couldn't pick it up.

Q. You went back there after they took Mr. Deen to the hospital?

A. Yes, sir.

Q. And you tried to lift that babbit- up?

A. Yes, sir.

Q. And You cou*n*dn't lift it?

A. No, sir.

Q. You tried to lift it and couldn't?

A. That*s* right.

Q. Did you observe at that time the condition of Mr. Deen's leg; after you got it out?

A. No, I just knew it broke, because I heard the bone [fol. 123] snap when the babbit- hit his leg and I could tell by the moving of it that his leg was broke. I never saw his leg after that.

Q. Now, with reference to trying to move that pot and trying to empty the babbit- from it away from you, could three men have done that job?

A. I suppose they could have, maybe.

Q. Could four men have done it?

A. Well, that might be possible; but I don't know whether four men could get to it or not; maybe they could have and maybe they couldn't.

Q. *Thre* three men have done the job with more ease than two men?

A. Yes, sir; I suppose three men would have been better on the job.

Q. Could three men have turned it over away from you so the babbit- could fall out?

A. I think so.

Q. With reference to the way you had to turn that pot to get the babbit- out, considering the weight of the pot, was that the only way that two men could have done it?

A. Yes, sir.

Q. Now, how long were you in that shop prior to this injury? I don't mean the length of time you had been working there for the company, but on that day prior to Mr. Deen't injury?

A. Well, I don't remember what time of day I went down there; but I had been there before that day.

[fol. 124] Q. You had been in and out of that shop?

A. Yes, sir; I don't remember when I was transferred to the blacksmith shop, but——

Q. Well, you had observed the equipment and the tools that were furnished to the employees of the shop?

A. Yes, sir.

Q. Were there any tools available in the shop at that time, on July 12, 1949, that could have done this job?

A. No, sir.

Q. Now, Mr. Snow, who are the bosses? Who do you employees in the shop take your orders from?

A. Well, at that time it was Mr. M. M. Johnson, the general foreman, and Mr. O. W. Williams, the Assistant foreman.

Q. Whose duty is it, or let me ask it this way: who customarily furnishes the equipment and tools?

A. The supervisor; the foreman.

Q. Either Mr. Johnson or Mr. Williams?

A. Yes, sir; one or the other.

Q. Were you ever present with Mr. Deen—I withdraw that. When you would need more tools there, Mr. Snow, who did you have to place your order with?

A. With one of the foreman.

Q. Where do those tools come from?

A. Well, sometimes they are made in the shop and sometimes they are ordered.

Q. Sometimes they were ordered?

A. Yes, sir; from various companies they purchase them from.

[fol. 125] Q. Have you ever ordered any tools, yourself?

A. No, sir.

Q. Never ordered any through the supervisor, or the general foreman?

A. No, sir.

Q. Have you ever requested additional tools?

A. No, sir; it has never been my place to do anything like that.

Q. Who does that in your shop?

A. The blacksmith always takes care of it.

Q. What is your title?

A. Cheauffeur and laborer with the storage department.

Q. Now, how long did you know Mr. Deen before his injury on July 12, 1949?

A. About four years, I guess. I went to work there in 1944 and he was there at that time.

Q. Prior to his injury, did you observe him, the way he would walk, and his ability to walk and motivate?

A. Yes, sir.

Q. Did you ever see anything wrong with him then?

A. Not that I ever noticed.

Q. Have you observed him subsequent to his injury?

A. Yes, sir.

Q. With reference to his physical make-up and his ability to walk, have you noticed any difference since his injury in July of 1949?

A. Yes, sir; he carries a limp with him now.

Q. He does?

[fol. 126] A. Yes, sir; he does.

Q. Well, is that every day—an every day thing with him?

A. At all times that I have noticed him; yes, sir.

Q. Now, Mr. Snow, has Mr. Deen, at any time subsequent to his injury, in your presence, complained about his injuries paining him?

A. Well, I have not been around him much, except to pass back and forth through the shop area.

Q. He has never complained to you?

A. No, sir. I never talked to him about it.

Q. Now, Mr. Snow, with reference to the tools that were available at the time of this injury, the occasion in question, for emptying this babbit- out of the melting pot; could you have—could there be any tools that were not furnished at the time, that were not available, that could have safely lifted that pot and removed that babbit-?

A. I suppose that there could have been something made to move it, to handle it and get the babbit- out of the pot.

Mr. Hudson: Your Honor, if he knows, I have no objection, but what he supposes is not the best evidence and we object to it and for that reason move that it be stricken.

Court: I sustain the objection.

Q. You know—or Mr. Snow, you at that time was the blacksmith, were you not?

Court: Gentlemen of the jury, you will not consider the answer just made as to what the witness supposed.

Q. You were the blacksmith at that time?

[fol. 127] A. Yes, sir.

Q. And it was *you* duty, or was it, to make certain equipment or tools, if you were ordered to?

A. Yes, sir.

Q. Could you have on this occasion or time, or prior there *to,* or subsequent thereto, have made tools or attachment or tools to attach to that hoist that would have handled this pot by lifting it up safely and emptying the babbit-?

A. Given time, I think so; yes, sir.

Mr. Hudson: Your Honor, the same objection to what the witness supposes; it-s the same thing and we move the court to strike the answer for the same reason.

Court: I overrule the objection.

Mr. Hudson: Note our exception.

Q. And, Mr. Snow, what would you do to attach the equipment, or make equipment available to handle this pot and babbit- safely?

A. I would have had to drill some holes in it and attach some I bolts, or a cople of them—could of —— "I" bolts to fasten the crane onto.

Q. Now, I show you here a picture of the hoist, plaintiff's Exhibit Six; you are familiar with that hoist, are you not?

A. Yes, sir.

Q. And also Plaintiff's Exhibit seven, which is also a picture of the hoist. What attachment, if any, would you make to attach to that hoist to handle the job? I will ask you this first, Mr. Snow, would that hoist, as it now stands, and as it was then equipped, have handled that job?

[fol. 128] A. Yes, sir.

Q. Safely?

A. Yes, sir.

Q. As it was then equipped?

A. Not the way the pot was; no, sir. The hoist would have handled it, but the pot was not equipped to be handled with the hoist.

Q. The pot wasn't equipped?

A. No, sir.

Q. Well, what would you have done from the standpoint of attachments in order to attach that hoist?

A. As I said before, there would have to be some "I" bolts fixed into that pot to fasten the hoist onto.

Q. If the foreman or other supervising personnel had ordered you, as the blacksmith, to make those attachments, you could have done so?

A. Yes, sir.

Q. At the time and on the occasion, Mr. Snow, from a standpoint of lifting the pot at the time of the injury, did you see any supervising personnel in the shop?

A. No, sir.

Q. When was the last time on that morning that you saw any of the supervising personnel, if you saw any?

A. Well, I don't remember seeing anyone in there prior to the accident.

Q. And did someone come in there subsequent to the accident, or while Mr. Deen was there?

A. After the accident?

[fol. 129] Q. Yes, sir?

A. I went through the machine shop and called Mr. Williams, who was out at the iron rack, some two hundred or three hundred feet away.

Q. And did he get there prior to the time that Mr. Deen was taken in the ambulance?

A. Yes, sir; he came right on in.

Q. And what was Mr. Deen't condition with reference to consciousness or semi-consciousness was concerned at that time?

A. He was in very much pain; they had moved him from the place I had left.

Q. They had already moved him from where you left him?

A. Well, he had moved himself some way or other; I don't know how.

Cross-examination of Earl H. Snow

Questions by Mr. Hudson:

Q. Mr. Snow, have you seen Mr. Deen take that pot out and lift the babbit—empty the babbit- out on prior occasions—one or more prior occasions?

A. I suppose that I have, but they had been working on the pot; I can't recall the dates or nothing, but I am sure I have seen him as I have been in the blacksmith shop there all the time and that pot was in the blacksmith building.

Q. Now, was anybody else in the particular building or [fol. 130] in the room where you and Mr. Deen were working at that time?

A. No, sir.

Q. Who, as between you and Mr. Deen, was in charge of removing of the pot?

A. Mr. Deen was in charge of removing the pot.

Q. And you know that—you saw that he was not getting it turned over and you went over and offered to help him; is that correct?

A. Yes, sir.

Q. All right. Whose decision was it as to how it was to be turned over; yours or Mr. Deen's?

A. I don't remember.

Q. Did he discuss with you the need for getting any more help, or did he just say "*lets* see if we can turn it over"?

A. There was nothing discussed about it, he was only trying it, and I just seen he wasn't doing a job of it and I went to offer my help.

Q. How far was it to where other men were working who could have helped?

A. Well, I don't know, sir; he would have had to go*ne* somewhere and seen the officials about help. I don't know where they were at.

Q. Well, that shop is not so big but what you could find somebody by walking a block or so?

A. You could have walked a block or so and found somebody.

Q. And did you talk Mr. Deen out of doing that, Mr. Snow?

A. There wasn't nothing said about it.

Q. And at that time did you have any discussion about [fol. 131] these drilling holes or "I" bolts, or anything of that sort with him?

A. No, sir.

Q. The truth about it, Mr. Snow, is that was the way he was doing it, and you just went over to help him to do it the way that he was doing it?

A. *Thats* right.

Q. All right. And it never occurred to you anything about putting "I" bolts or drilling holes, or anything of that sort, did it?

Q. No, sir; it didn't.

A. So far as you know, it didn't occur to Mr. Deen?

Q. So far as I know, no, sir; it didn't.

Q. Now, I assume that when you talk about drilling holes, you take a cutting torch and cut a hole in there, or use some kind of a drill that you have down there in *you* shop to do it with?

A. *Thats* right.

Q. They do have cutting torches and drills that they could do that with?

A. Yes, sir.

Q. And they do have the "I" bolts you are talking about?

A. They could have been made; yes, sir.

Q. Do you know, or —— ever seen that kind of device applied to that kind of a pot?

A. No, sir.

Q. The truth is that one of those pots last for years and years and years, doesn't it?

[fol. 132] A. So far as I know, yes; I don't know much about them.

Q. And you wouldn't be moving one of those pots, maybe, more than once in five or ten years, would you?

A. I don't know how often they have to move them; I am not acquainted with those pots in anyway.

Q. Well, in other words, that is not your department?

A. *Thats* right; that is not my department.

Q. That is Mr. Deen'*t* department?

A. *Thats* right.

Q. And while you were in there helping him, it was his job and you were just helping him to do his job?

A. *Thats* right.

Q. All right. Now, they asked you about somebody else getting the pot up. You all were pulling, I think, leaning over with your hand braced and coming up something like this?

A. Yes, sir.

Q. One of your with your right hand and the other with your left?

A. Yes, sir; that would be Mr. Deen because he was over that way pulling up where it would come up toward his right leg.

Q. Did it hit your foot?

A. No, sir.

Q. Well, was there anything dangerous about it if you would keep your feet out of the way, Mr. Snow?

A. I wouldn't think so.

Q. As a matter of fact, you had gotten it up on edge—that is, on its edge, where it was up-right before the babbit-[fol. 133] fell out; is that right?

A. Yes, sir.

Q. Now, the strain of lifting it was over at the time that babbit- fell out, was it *now*, Mr. Snow?

A. Yes, sir; I believe it was.

Q. That third man they were asking about, if he had been lifting, would he have just been standing behind it, with it up like that, wouldn't he?

A. Just about, after it was up out of the strain.

Q. All right. And that third man*d* wouldn't have kept the babbit- from falling out, would he, Mr. Snow?

A. No, sir; I don't think so.

Q. In other words, the babbit- is coming out after you get the pot up-right, whether there were three men or six men ahold of it?

A. *Thats* right.

Q. All right. Then, and so—strike that. Now, did you see Mr. Deen get the old pot out and get it on the floor?

A. I probably did, but it probably was just from the corner of my eye, or something, but I was over—there was a big steam hammer working there. I probably noticed him get it out, but didn't pay attention to him taking it out, but probably saw him.

Q. Anyway, he had the pot out and on the floor?

A. *Thats* right.

Q. And you had seen that operation before, hadn't you?

A. Yes, sir.

Q. All right. Then, you know—or did you hear it drop; [fol. 134] or hear it hit the floor?

A. No, sir.

Q. Were you close enough to have heard it, if it had?

A. Yes, sir.

Q. In any event, when you saw him, it was on the floor, on its bottom and facing upward?

A. Yes, sir.

Q. And he was trying to turn it over?

A. Yes, sir.

Q. And that is when you went there?

A. Yes, sir.

Q. All right. Now, one more question: if you or he had thought it was necessary, could you have gone to the foreman and asked for some more help there?

A. Yes, sir.

Q. Were there men available in that same general area—I don't mean men within ten feet—but men in that general area available to be assigned, or could have been assigned to help you?

A. Yes, sir.

Q. All right. And all it would have caused would have been a delay? Delay getting the job done; is that right?

A. Yes, sir.

Mr. Hudson: *Thats* all.

Redirect examination of Earl H. Snow

Questions by Mr. McCord:

Q. Now, Mr. Snow, with reference to men being available, the request would have been made, would it not, to the [fol. 135] supervising personnel for additional men?

A. Yes, sir.

Q. And then when *w*hose men would be assigned would be problematical; would it not?

A. Would be what?

Q. Problematical; they would not *necessiarily* have been assigned on that day; is that true?

A. Well, they probably would have been; but you would have had to went to the foreman and asked for help, and he would have had to go and get help.

Q. And what was the condition at that time, Mr. Snow, if you know, with reference to the work load out there at that time; were you busy?

A. Well, from the general talk in the shop they were, everybody was, and I know I was and I was part of that department. From the general talk everybody was pretty busy at that time.

Q. You were pretty busy yourself?

A. Yes, sir.

Q. You had a lot of work?

A. Yes, sir.

Q. And you had enough work to keep you busy during your eight hour shift?

A. Yes, sir.

Q. And without having to go help somebody else?

A. Yes, sir.

Q. And that was the general condition at that time?

A. Yes, sir; so far as I know. It was the general talk of [fol. 136] the shop that everybody was overloaded with work.

Q. Now, Mr. Snow, if you had a third man, you would have been behind the pot, would you not?

A. I, myself?

Q. Yes, sir. In other words, if you had had a third man you would not have all three been in front of it, would you Mr. Snow?

A. No, sir; I wouldn't think so.

Q. Because with a third man, you could have moved it over from you, and dumped the babbit- out, could you not?

A. Yes—yes, sir; I think so.

Q. And also with reference to pulling the pot up the way you did, were not the conditions and the area in which you were working in somewhat crowded at the time?

A. Well, pretty close quarters; yes, sir.

Q. Pretty close quarters?

A. Yes, sir.

Q. And therefore, from *you* side of the pot, your left leg could easily have been out of the way, whereas, Mr. Deen's side of the pot could be in the close quarters and he had to place his right leg somewhere where he could get in that position and get leverage?

A. Yes, sir.

Q. And of course had Mr. Deen been on your side and you had been on Mr. Deen'*t* side, the situation might have been reversed; it might have been your leg that was injured?

A. It could have been reversed; yes, sir.

[fol. 137] Recross-examination of Earl H. Snow

Questions by Mr. Hudson:

Q. Now, he keeps talking about being in front of the pot—you and Mr. Deen being in front of the pot; neither of you were in front of the pot, were you Mr. Snow; you were at the ends, were you not?

A. We were working from each end—it was in front, but we were on each end.

Q. All right. In fact, the truth of the matter, the only thing that was in front of the pot was Mr. Deen's right leg, wasn't it?

A. Well, it seemed to be; yes, sir.

Q. All right. In other words, what I am getting at is that you didn't get hold of that pot and pull it up toward you like that—you didn't grab hold of it and pull it up like that toward you; did you?

A. No, sir.

Q. You got ahold of the end of it and the pot was in here between you?

A. Yes, sir.
Q. And you had your foot out of the way and he didn't?
A. Yes, sir.
Q. Is that right?
A. Yes, sir.
Q. And, now, he asked about close quarters; he had a foot or so there that he could have got his foot out of the way, didn't he?
[fol. 138] A. I would say approximately a foot or so; about that much, I would say.
Q. As a matter of fact that pot was just about half way in between those things you were pulling on, wasn't it; that is, between the furnace and the work bench?
A. Well, yes, sir; it was laying somewhere pretty close in the center.
Q. And you wouldn't say that he had less room to work in that you did, would you?
A. The only thing, I was at the corner of the work bench, and he had part of the furnace back to the side of him, which he had—there wasn't no room, no way to step back around behind it.
Q. But you think he had a foot or so in which to move his foot back out of the way?
A. It is possible that he might have moved it back *tha* much.

Mr. Hudson: *Thats* all.

Redirect examination of Earl H. Snow

Questions by Mr. McCord:

Q. Mr. Snow, when that babbit- fell, it fell pretty fast, didn't it?
A. Very fast.
Q. And without notice to you or to Mr. Deen?
A. Yes, sir; it sure did.

Mr. Hudson: By the way, did he or you, or one *or* you say "Watch out for your toes that thing might crash it?"
A. I don't remember that phrase being said; it is possible [fol. 139] that it was.

Mr. Hudson: When you got the pot up-right, you don't remember one or the other of your making that statement?

A. No, sir; but it is possible it was said.

J. G. ANDERSON, called as a witness for the plaintiff, was sworn and testified as follows:

Direct examination

Questions by Mr. McCord:

Q. Will you state your name, please sir?
A. J. G. Anderson.
Q. Where do you live, Mr. Anderson?
A. I live at Blanket.
Q. And how long have you lived in Brown County, Texas?
A. Nearly twelve years.
Q. Are you a married man?
A. Yes, sir.
Q. Got a family?
A. Yes, sir.
Q. For whom are you employed?
A. The G. C. and S. F.
Q. And how long have you been so employed?
A. In July it will be twelve years.
[fol. 140] Q. Were you employed by the Gulf, Colorado and Santa Fe Railway on or about July 12, 1949?
A. Yes, sir.
Q. Do you know Mr. Earl Deen, the plaintiff in this law suit, sitting here?
A. Yes, sir.
Q. How long have you know him?
A. Well, ever since I went to work for the Santa Fe; he was working there then.
Q. He was working prior to the time you came to work for them?
A. Yes, sir.
Q. On the 12th of July, 1949, what shift were you working?
A. I was working on the first shift.

Q. The first shift?
A. Yes, sir.
Q. Was that from 8:00 A.M., to 4:00 P.M.?
A. Yes, sir.
Q. And what were you working as?
A. Coppersmith.
Q. The same position that Mr. Deen was employed as?
A. Yes, sir.
Q. Now, who was your supervising personnel there?
A. M. M. Johnson and O. W. Williams.
Q. Now, talk loud enough Mr. Anderson so the farthest gentleman on the jury can hear you?
A. M. M. Johnson and O. W. Williams.
Q. On that morning, what were you working on?
[fol. 141] A. Well, we was working on an engine that was over the drop pit; I don't remember which engine it was.
Q. Now, you said "We" who were "We"?
A. Well, me and Earl.
Q. You and Earl Deen?
A. Yes, sir.
Q. And what were you doing with that engine?
A. Well, it must have been a hydrostatic test, because it was over the drop pit.
Q. And while working on that engine that morning, did you see anybody come up and talk to Mr. Deen?
A. Well, Bettis came in and Mr. Johnson—I suppose they had been over at the depot, they came in and said something to him.
Q. And got Mr. Deen off the engine?
A. Yes, sir.
Q. And that was Mr. W. J. Bettis?
A. Yes, sir.
Q. Is his title "Clerk?"
A. At that time—he was clerk at that time.
Q. Store clerk?
A. Store clerk.
Q. And Mr. Johnson—what Johnson was that?
A. That was M. M. Johnson, the foreman.
Q. And they both talked to Mr. Deen?
A. Well, I don't know which one talked to him; they were together—well, I do know that Bettis talked to him.

Q. All right. Then what did Mr. Deen do?

[fol. 142] A. He immediately left.

Q. He immediately left. And did you know at that time what he was going to do?

A. No, I didn't; I sure didn't.

Q. And were you puzzled at his walking off the engine job?

A. I certainly was; we had a rush job.

Q. You had a what?

A. We had a rush job on it.

Q. You had a rush job on it?

A. Yes, sir.

Q. Now with reference to repairing that engine, did you have any instruction as to when that engine would have to be out of there?

A. No, I was working, running repair, and it was—they pulled me off of running repair and put me on this dead engine. They pulled me off the job that I was on and put me on this dead engine.

Q. Running repair; is that moving trains?

A. Yes, sir; that's moving trains.

Q. And dead repair is stuff that has come in for complete overhaul?

A. That's right.

Q. And they pulled you off of running repair and placed you on this job because it was a rush job?

A. Yes, sir.

Q. Now, who was it that instructed you, or told you this was a rush job?

A. Well, I guess it was Oscar Williams; I suppose he was [fol. 143] the one that told me.

Q. Do you remember who it was?

A. No, I don't remember.

Q. Do you know that somebody told you?

A. Somebody told me, and I am pretty sure it was him, because he was the one to——

Q. Do you know that it was either Mr. Johnson or Mr. Williams?

A. I would say it was Mr. Williams, because he was the one seeing after it.

Q. And do you remember what he told you about it?

A. Well, he wanted to get it out just as quick as possible.

Q. With reference to repairing that engine that was a rush job, was it necessary, as a coppersmith, in doing your repairs, to have babbit- available?

A. Well, on that kind of a job we would have some babbit- to pull.

Q. You would have some babbit- to pull?

A. Yes, sir.

Q. And you would have babbit- to replace?

A. Yes, sir.

Q. And in order to have that babbit- ready, Mr. Anderson, you being a coppersmith, you are familiar with the pot there, are you not? And furnace?

A. Yes, sir.

Q. You know where the melting pot is, and the furnace is, that you use to melt that babbit-?

A. Yes, sir.

Q. It would be necessary to operate that furnace, would [fol. 144] it not?

A. Yes, sir.

Q. It would be necessary to melt the babbit-?

A. Yes, sir.

Q. Now, on that occasion, after Mr. Deen left the engine that you were working on, with Mr. Bettis, did you see him any more that morning?

A. Not until after the accident.

Q. About what time in the morning was it that Mr. Bettis walked up there?

A. Well, it was—I would say it was about ten o'clock because I think they went over to the depot after the mail.

Q. Now, what was the condition, Mr. Anderson, with reference to the work that was in the shop at that time; that is, was it heavy or light?

A. Well, we had plenty of heavy work.

Q. You had plenty of heavy work?

A. Yes, sir.

Q. And what was the condition of the labor situation at that time?

A. Well, it seemed like — was running short-handed and working over-time.

Q. You were working over-time?

A. Yes, sir.

Q. Was that condition general throughout the shop, in your department and in other departments?

A. Yes, sir.

Q. Now, were you familiar with this pot—this melting pot?

A. Yes, sir.

[fol. 145] Q. I show you the plaintiff's Exhibit No. 4, that is a picture, is it not, of a pot—a melting pot?

A. That's right.

Q. And I show you plaintiff's Exhibit No. 1, which is a picture of the pot in the furnace?

A. Yes, sir.

Q. Now, did you help place the new pot in the furnace after Mr. *Dean* was hurt?

A. I don't recall placing it—I remember putting one pot in there, but it might have been another one.

Q. Have you ever been called on to—on any occasion, Mr. Anderson, to help lift the pot out of the furnace and empty the babbit- from it to replace it with a new pot?

A. No, sir.

Q. You have never been called on to do that?

A. No, sir.

Q. You were never called on to do that type of job?

A. I helped to put one in, but I don't think I ever took one out.

Q. You are familiar with the equipment and tools available in the shop and that were available on July 12, 1949?

A. Yes, sir.

Q. Was there any equipment or tools available in the shop on July 12, 1949, to your knowledge, that would—or they would be able to safely lift this pot and turning it over to remove the babbit—the pot weighing some 200 pounds and the babbit- weighed some 590 pounds——

Mr. Hudson: Now, your Honor, the question as to whether [fol. 146] it could be safely done or not, that is for the jury to determine, and this question invades the province of the jury and asks for an opinion and conclusion of the witness, and we object to it.

Court: Overruled.

Mr. Hudson: Note our exception.

A. You want me to answer that?

Q. Yes, sir?

A. The tools they had was all that I know of, were the tools that Mr. Deen used to take it out with.

Q. And those were the only tools available?

A. Yes, sir.

Q. And were any of those tools adequate to lift the pot from the ground, after it was taken out of the furnace—to lift the pot up so you could dump the babbit- out?

A. No, sir.

Mr. Hudson: We object to it, your Honor; it calls for an opinion and conclusion of this witness, and invades the province of the jury.

Court: Overruled.

Mr. Hudson: Note our exception.

Q. You answered that question "No, sir"?

A. No, sir.

Q. Now, you have known Mr. Deen, have you not, for twelve years prior to the accident?

A. Yes, sir.

Q. And you observed him, the way he walked and motivated himself physically prior to the accident on July 12, 1949?

[fol. 147] A. Yes, sir.

Q. What were your observations of him at that time?

A. Well, he could get around as good as anybody.

Q. And have you observed him subsequent to his injury on July 12, 1949?

A. Yes, sir.

Q. What has been your observation of him since that time?

A. Well, he has to—you notice him giving to that bad leg.

Q. And is that a daily occur-ence?

A. Yes, sir.

Q. Or is *ti* just at times?

A. All the time.

Q. All the time. Do you know whether or not his injury and his present condition physically has handicapped him in the performance of his duties out there?

A. Well, I have never worked in the same shift with him since.

Cross-examination of J. G. Anderson

Questions by Mr. Hudson:

Q. Now, Mr. Anderson, you say his leg gives with him; he limps is what you mean, isn't it?

A. That's right.

Q. Now, this babbit- pot, the one that they had removed or was going to remove; that pot had been there some four or five years before it cracked, had it not?

[fol. 148] A. Well, it was a permanent fixture.

Q. What I am getting at, those pots last a long time, don't they?

A. Yes, sir.

Q. And you know, do you not, Mr. Anderson, that Mr. Deen, in the preceding couple of weeks, had taken that pot out two or three times to braze it; you know that, don't you?

A. Yes, sir.

Q. And put it back?

A. Yes, sir.

Q. And you know, do you not, that he did it with the same equipment that was out there and used on July 12, 1949, don't you?

A. Yes, sir.

Q. All right. And he had gone through exactly the same operation that he had gone through on these other occasions?

A. I reckon.

Q. All right. And you also know that nobody got hurt doing it, don't you?

A. Yes, sir.

Q. All right. Now, was—or do you remember how many days before he got hurt was it that you had used that pot, the one that was removed?

A. Well, we had cut the fire out and let it cool for this new pot that was coming in.

Q. All right. Then you had used it the day before and had cut the fire out to let it cool?

A. Yes, sir. We kept the fire burning all the time.

[fol. 149] Q. And it was let to cool so it could be substituted with the new pot?

A. Yes, sir.

Q. Do you remember this engine that you and Mr. Deen was working on that morning before he got hurt; do you remember what class engine that was?

A. I believe it was 4800 class; I am not sure, but I believe it was.

Q. Do you now say that it had some babbit work that had to be done on it?

A. I am pretty sure it did, because I know that we was in a rush for the pot.

Q. All right. Well, actually except for the fact of Mr. Deen getting hurt, the taking of the pot out and putting a new one in was just a five or ten minute job, wasn't it?

A. That's right.

Q. Did you check the record to see what you worked on that day, Mr. Anderson?

A. No, I didn't.

Q. Would you be surprised to know that you worked on four different engines?

A. Before that?

Q. That same day?

A. I know that I was on running repair and they took me off and put me on this dead engine.

Redirect examination of J. G. Anderson

Questions by Mr. McCord:

Q. You worked on both running repair and dead that day?

[fol. 150] A. Yes, sir.

Q. Now, Mr. Anderson, if you needed additional tools and equipment, who would you have ordered them from, or who would you have requisitioned them from?

A. Well, I suppose the foreman.

Q. The foreman?

A. Yes, sir.

Q. Did you ever requisition any tools or equipment?

A. Just tools to work with.

Q. Did you always get the tools that you requisitioned from the foreman?

A. Not always.

Q. You didn't always get what you requisitioned?

A. No, sir.

Q. What tools have you requisitioned that you didn't get, Mr. Anderson?

A. Well——

Mr. Hudson: Now, your Honor, I don't know what bearing that could have on this law suit, and we object to it.

Court: I sustain the objection.

Mr. McCord: That's all.

Mr. Hudson: No further questions.

[fol. 151] Lonnie Webb, called as a witness by the plaintiff, was sworn and testified as follows:

Direct examination

Questions by Mr. McCord:

Q. Please state your name?

A. Lonnie Webb.

Q. Mr. Webb, where do you live?

A. I live at 404 Norwood.

Q. And how long have you lived in Brown County, Texas?

A. About twelve and a half years.

Q. Are you a married man?

A. Yes, sir.

Q. Have a family?

A. Yes, sir.

Q. And who do you work for?

A. Santa Fe railroad.

Q. And how long have you worked for the Santa Fe?

A. A little over twelve years.

Q. And were you so employed on July 12, 1949?

A. Yes, sir.

Q. What were you employed as?

A. Boiler maker.

Q. Boiler maker. What shift did you work?

A. I am not sure, but I think it was the third shift.

Q. Now talk loud enough, please sir, so that the last man on the jury can hear you. How long have you known [fol. 152] Mr. Earl Deen, the plaintiff sitting here?

A. Between twelve and 13 years.

Q. And you knew him for how long prior to his accident on July 12, 1949?

A. Well, I knew him since forty-two, the first of '42.

Q. And were you with him quite frequently after that?

A. Yes, sir.

Q. From 1942 until July 12, 1949?

A. Yes, sir.

Q. Did you observe him during that time, the way he walked and the way he motivated his body?

A. Yes, sir.

Q. Prior to his injury?

A. Yes, sir.

Q. What did you observe about that?

A. I observed he was normal.

Q. Was he able to get around all right?

A. Yes, sir.

Q. And at that time, did you ever observe or see him in climbing up on anything?

A. Yes, sir.

Q. Was he able to do it?

A. Yes, sir.

Q. Was he agile in the performance of his duties that required that?

A. Yes, sir.

Q. Now have you observed him subsequent to his injuries of July 12, 1949?

[fol. 153] A. Yes, sir.

Q. And about how often since July 12, 1949, have you observed him? Would it be once a week, or every day, or how often would you say?

A. Well, at least five days a week.

Q. About five days a week?

A. Yes, sir.

Q. And what have you observed since his injuries of July 12, 1949?

A. Well, I observed that he more or less walks with a limp—moves around with a limp, and he doesn't seem to handle, or to put the foot as good as his other.

Q. And are there any other observations that you have observed him doing or not doing since July 12, 1949?

A. According to his leg?

Q. Yes, sir?

A. Yes, sir; I have seen him raise his trousers leg up and rub his leg, and I have noticed that it had red streaks on it at times; and I have seen him put his bandage on it, an elastic bandage.

Q. And does he wear that elastic bandage all the time that you know of?

A. No, sir; I don't think so.

Q. You don't think he wears it all the time?

A. Not that I know of.

Q. Does he wear it most of the time?

A. As well as I know, I judge about fifty percent of the time, I would say.

[fol. 154] Q. He wears it about fifty per cent of the time?

A. Yes, sir.

Q. So far as you know?

A. Yes, sir.

Q. Now, can you give us the approximate times when you have seen his leg with the red streaks?

A. Well, I have off and on ever since that date.

Q. Well, placing it approximately, would you say that was every week, every two weeks, or every month, or every day, or how long?

A. Well, I have heard him complain with it swelled—or I wouldn't say it was a red streak that often, once a month, but I have seen it and I have also seen it when it was swollen.

Q. How often have you seen the leg swollen?

A. Well, I wouldn't know how often, I wouldn't say whether it was once or more a month, or once every two months; but a number of times.

Q. And how recently have you seen it; if you have seen it recently—the last time you saw it?

A. Well, I wouldn't say the exact date, but not over six weeks, or two months.

Q. And you—have you ever heard Mr. Deen complain about any pain in his leg?

A. Yes, sir; I have.

Q. How often have you heard that?

A. Well, it's more or less the times I have heard him complain of his leg like I have heard him make the remark——

[fol. 155] Mr. Hudson: Your Honor, what the man said, I don't believe that would be admissible. That would be hearsay.

Court: I sustain the objection.

Q. Now, Mr. Webb, you were—where were you working on July 12, 1949?

A. For the Santa Fe Railroad.

Q. For the Santa Fe. And were you working in the shop?

A. Yes, sir.

Q. And your title was "Boiler Maker?"

A. I believe that was right; it was either boiler maker or helper, and I believe it was boiler maker.

Q. What was the condition of the work at the shop, at that time?

Mr. Hudson: Your Honor, I am not—I think I am right; this man was working night shift, and he was not working at the time that Mr. Deen was injured, but was working the night shift; and if I am right about that, then I object because he was not on the job on that day and was not in a position to know.

Q. What was your shift on that day?

A. It was the third shift; from twelve until eight in the morning.

Q. From twelve to eight in the morning?

A. Yes, sir.

Q. On your particular shift, were you heavily loaded with work, or were you having very little to do?

Mr. Hudson: Your Honor, we object to that; it would be too remote, be some other time, some other job; his job [fol. 156] is not the same as Mr. Deen's, but in a different department and on a different shift, and too speculative.

Court: Yes, I sustain the objection.

Mr. McCord: That will be all, Mr. Webb.
Mr. Hudson: No questions.

Mrs. Earl R. Deen, called as a witness by the plaintiff, was sworn and testified as follows:

Direct examination

Questions by Mr. McCord:

Q. Mrs. Deen, have you been sworn?
A. Yes.
Q. You are Mrs. Earl Deen?
A. Yes, sir.
Q. Mrs. Deen, you are the wife of Earl R. Deen, the plaintiff in this law suit?
A. Yes, sir.
Q. How long have you and Mr. Deen been married?
A. Fifteen years.
Q. Fifteen years.
A. Yes.
Q. You have observed Mr. Deen quite frequently, have [fol. 157] you not, prior to the date of his injury in July 12, 1949?
A. Sure.
Q. What was or is your observation as to Mr. Deen's physical ability prior to July 12, 1949?
A. He had unusual physical ability.
Q. Was he able to walk normally?
A. Yes.
Q. Was he able to dance?
A. Yes.
Q. And has Mr. Deen always been a hard worker?
A. Sure.
Q. Has always been industriously inclined?
A. Too much so.
Q. Now, Mrs. Deen, subsequent to the injury of Mr. Deen on July 12, 1949, you have had occasion to observe Mr. Deen, have you not?
A. Yes.

Q. And about how often have you seen him, on a daily average?

A. Every day.

Q. Every day?

A. Yes.

Q. Morning and night?

A. Yes, sir.

Q. And what is your observation with reference to his physical abilities and condition subsequent to his injuries on July 12, 1949?

A. Well, you mean since?

[fol. 158] Q. Yes; since?

A. Well, he definitely has a limp—shall I tell it in my own words?

Q. Mam?

A. You want me to tell my complete observations?

Q. Just tell what you have observed; what the facts are?

Mr. Hudson: Now, your Honor, I don't want this witness making a diagnosis—any medical diagnosis, if she just tells what she knows and sees that will be all right.

Q. You can't give your opinion, but just state what you have seen and know.

A. He walks with a limp; he cannot climb up a ladder on his toes; he has to stand on the entire foot, flat; he can't climb any incline or embankment without stepping sideways on the entire foot; and that leg is smaller than the other leg when he is undressed; and the leaders and muscles are taut, they are not limber; the arch is somewhat flat as compared to the other one; he never limbers up the shor on that foot like a man normally would that walks with complete activity with the muscles and the arch in that leg; he has swelling at times, and it is worse at times than other times, especially in hot weather it is worse; and for that reason he wears a bandage part of the time, and part of the time he can get by without it; but he wears it at least half the time without a sock.

Q. And have you observed Mr. Deen when he has taken his shoes off; his ability to walk barefooted?

A. He can't walk barefooted without a great deal of

[fol. 159] limp; he doesn't have activity in the arch of that foot, normally.

Q. Have you and Mr. Deen, subsequent to that injury, attempted to dance?

A. Yes.

Q. Is he able to dance?

A. No.

Q. Now, since the date of that injury, Mrs. Deen, at any time have you been present when Mr. Deen complained of any pain?

A. Sure; lots of times.

Q. How often would you say did that happen?

A. Well, he really is not the complaining type, but he complains quite often of pain—of it paining him in the old break, and complains of it throbbing in the old break. At one time he had a lot of pain due to the blood coming to the surface that the circulation in that leg would not take up; and he had to have medicine from the doctor——

Mr. Hudson: Your Honor, I believe that is invading the province of the medical profession there, and I object to it for that reason and move that it be stricken.

Court: Gentlemen of the jury, do not consider that statement about medical treatment.

Q. Well, you have observed that Mr. Deen's leg at times would be discolored?

A. Yes, that's facts.

Q. Mam?

A. That was facts.

Mr. Hudson: Well, I didn't object to that.

[fol. 160] Q. And you have observed the leg being swollen?

A. Yes.

Q. Have you tried at any time to test the numbness or the sensitivity of his foot?

A. Yes, the heel was numb.

Q. Did you ever try to put a pin in his heel?

A. Not that I know of.

Q. Did he ever try it in your presence?

A. Not that I know of.

Q. Did he ever try it in your presence?
A. I am not sure.

Mr. McCord: I believe that's all.
Mr. Hudson: No questions.
Mr. Hudson: I will agree that the defendant was engaged in inter-state commerce at the time of plaintiff's injury on July 12, 1949, and prior thereto.
The testimony was closed.

[fol. 161] Reporter's Certificate and Agreement of Counsel as to Statement of Facts Omitted in Printing.

[fol. 162] IN THE 35TH DISTRICT COURT OF BROWN COUNTY, TEXAS.

[Title omitted]

COURT'S CHARGE—Filed April 13, 1954

Gentlemen of the Jury:

This case is submitted to you upon the following special issued, which you will answer as you find from the evidence and such answers, when unanimously made by you and signed by your foreman, will constitute your verdict.

You will answer each issue submitted to you without considering whether or not your answer may be favorable or otherwise either party to the suit. You will confine your deliberations in the case to the law as given you by the Court, and to the facts introduced in evidence in this case, and you will allow nothing else to sway or influence you in arriving at your verdict. You will not under any circumstances discuss any matter not introduced in evidence before you on the trial, nor will you reach any decision by lot.

You are the exclusive judges of the facts proved, of the credibility of the witness, and of the weight to be given to

the evidence; but you are bound to receive the law from the Court, which is herein given you, and be governed thereby.

By the Term "Preponderance of the evidence" is meant the greater weight of credible evidence.

[fol. 163] "Negligence" is the doing of that which a person of ordinary prudence would not have done under the same or similar circumstances; or failed to do that which a person of ordinary prudence would have done under the same or similar circumstances.

"Ordinary Care", as that term is used in this charge means such care as an ordinary prudent person would have exercised under the same or similar circumstances.

"Proximate Cause", as that term is used in this charge, means the moving and efficient cause which prudences the result complained of and without which such result would not have occurred, and in the light of the attending circumstances such result, or a similar one, ought to have been foreseen by a person of ordinary care and prudence. There may be more than one proximate cause.

By the term "Sole Proximate Cause" is meant the only proximate cause and no other. There can be only one sole proximate cause.

By the term "Proper supervision", as used in this charge, is meant such supervision as an ordinarily prudent employer would have given to the plaintiff under the same or similar circumstances.

By the Term "Proper Tools", as used in this charge, meant such tools as a reasonably prudent man would have deemed sufficient to do the work in which plaintiff was engaged with reasonable safety.

Special Issue No. I:

Do you find from a preponderance of the evidence that Defendant failed to furnish plaintiff with proper tools to remove the babbitt from the melting pot at the time and on the occasion in question?

[fol. 164] Answer: Yes or No.

Answer Yes.

John R. Wood, Foreman.

If you have answered Issue No. I. "Yes", and only in that event, then you will answer Issue No. 2.

Special Issue No. 2:

Do you find from a preponderance of the evidence that the failure of the defendant to furnish plaintiff with the proper tools to remove the babbitt was negligence?

Answer: Yes or No.

Answer Yes.

John R. Wood, Foreman.

If you have answered Issue No. 2 "Yes", and only in that event, then you will answer Issue No. 3.

Special Issue No. 3:

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to Issue No. 2, was a proximate cause of the injuries, if any, in question to the plaintiff?

Answer: Yes or No.

Answer Yes.

John R. Wood, Foreman.

Special Issue No. 4:

Do you find from a preponderance of the evidence that the Defendant failed to furnish one or more additional men to Plaintiff, other than Snow, to assist Plaintiff in removing the babbitt from the melting pot at the time and on the occasion in question?

Answer: Yes or No.

Answer No.

John R. Wood, Foreman.

[fol. 165] If you have answered Issue No. 2 "Yes", and only in that event, then you will answer Issue No. 5.

Special Issue No. 5:

Do you find from a preponderance of the evidence that the failure of Defendant to furnish one or more additional men to Plaintiff, other than Snow, to assist Plaintiff in removing the babbitt, if you have so found, was negligence.

Answer: Yes or No.

Answer —

—— ——, Foreman.

If you have answered Issue No. 5 "Yes", and only in that event, then you will answer Issue No. 6.

Special Issue No. 6:

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to Issue No. 5, was a proximate cause of the injuries, if any, to plaintiff.

Answer: Yes or No.

Answer —

—— ——, Foreman.

Special Issue No. 7:

Do you find from a preponderance of the evidence that the defendant failed to give to plaintiff proper supervision at the time and on the occasion in question?

Answer: Yes or No.

Answer No.

John R. Wood, Foreman.

[fol. 166] If you have answered Issue No. 7, "Yes", and only in that event, then you will answer Issue No. 8.

Special Issue No. 8:

Do you find from the preponderance of the evidence that defendant's failure to give to Plaintiff proper supervision, if you have so found, was negligence?

Answer: Yes or No.

Answer —

—— ——, Foreman.

If you have answred Issue No. 8, "Yes", and only in that event, then you will answer issue No. 9.

Special Issue No. 9:

Do you find from the preponderance of the evidence that such negligence, if any you have found in Answer to Issue No. 9, was a proximate cause of the injuries, if any, to the Plaintiff?

Answer: Yes or No.

Answer —

—— ——, Foreman.

Special Issue No. 10:

Do you find from a preponderance of the evidence that the Plaintiff Deen was negligent in failing to *bo*tain additional help to do the work he was doing at the time he received his injuries?

Answer Yes or No.

Answer: Yes.

John R. Wood, Foreman.

If you have answered Special Issue No. 10 "Yes" and in that event only, you will answer the following Issue No. 11.

[fol. 167] Special Issue No. 11:

Do you find from a preponderance of the evidence that the negligence, if any, of Plaintiff inquired about in Special Issue No. 10 was a proximate cause of his injuries?

Answer: Yes.

John R. Wood, Foreman.

(There is no Special Issue No. 12.)

Special Issue No. 13:

Do you find from a preponderance of the evidence that the Plaintiff was negligent in the manner and method used in doing the work at the time of his sustaining his injuries? Answer "Yes" or "No".

Answer No.

John R. Wood, Foreman.

If you have answered Special Issue No. 13 "Yes", and in that event only, you will answer the following Issue No. 14.

Special Issue No. 14:

Do you find from a preponderance of the evidence that the negligence of the plaintiff, if any you have found, inquired about the preceding issue No. 13, was a proximate cause of his injuries?

Answer "Yes" or "No."

Answer —

—— ——, Foreman.

[fol. 168] Special Issue No. 15:

Do you find from a preponderance of the evidence that the defendant railway company and its supervisory employees should have reasonably acticipated that the Plaintiff would perform the work which caused his injuries in the way and manner in which he did do it?

Answer "Yes" or "No".

Answer: Yes.

John R. Wood, Foreman.

Special Issue No. 16:

Do you find from a preponderance of the evidence that the sole proximate cause of Plaintiff's injuries was not due to his own acts and conduct?

Answer either: "It was not the sole proximate cause of his injuries" or

"It was the sole proximate cause of his injuries".

Answer: "It was not the sole proximate cause of his injuries".

John R. Wood, Foreman.

Special Issue No. 17:

What amount of money, if any, if paid now in cash, do you find from a preponderance of the evidence, will fairly and reasonably compensate the Plaintiff for the injuries, if any, sustained by him on July 12, 1949, on the occasion in question?

Answer in dollars and cents, if any, or none.

$39,000.00.

John R. Wood, Foreman.

[fol. 169] In answering the above and foregoing issue, you may take into consideration the nature, character and extent of the injuries, if any, sustained by plaintiff upon the occasion in question; also any physical pain and suffering, if any, which you may find from a preponderance of the evidence the Plaintiff has undergone as a direct result of such injuries from the date of such injuries up to this time; also any physical pain and suffering, if any, which you may find from a preponderance of the evidence he will reasonably and probably undergo in the future as a direct result of such injuries, if any; also any loss of earnings,

if any, which you may find from a preponderance of the evidence, the plaintiff has sustained as a direct result of such injuries, if any, from the date of said accident up to now; also any diminished earning capacity, if any, to work and earn money in the future, if any, as a direct result of said injuries.

In connection with this issue, you are also instructed that if you find plaintiff has sustained damage as a direct result of the accident in question on July 12, 1949, then the amount, if any, allowed for any decreased ability to work and earn money in the future, if any, and the amount, if any, allowed for future pain and suffering, if any, should be the present value thereof, and in determining the present value thereof you will make adequate allowance for the earning power of money by discounting such amount, if any, at the highest net rate of interest at which money can be safely and securely invested in this locality; and make the result your answer to this question.

[fol. 170] You are instructed that in answering the above issue you cannot allow the plaintiff anything for medical expenses, doctor's bills, nursing or hospital bills.

If you have answered any of the issues in this charge to the effect that the Plaintiff, Deen, was guilty of negligence and that his negligence was a proximate cause of his injuries, then you will answer the following issue:

What sum of money do you find from a preponderance of the evidence, should the recovery you have allowed herein (if you have allowed any) be reduced by reason of such negligence, if any of the Plaintiff?

Answer in dollars and cents, if any, or none.

Answer: $17,550.00.

45%.

John R. Wood, Foreman.

In determining the amount Plaintiff's recovery should be reduced, if any, you are instructed that if you have found any negligence on his part that was a proximate cause of his injuries and if you have found any negligence on the part of the Defendant that was a proximate cause of plaintiff's injuries, you should reduce said recovery by an

amount which bears the same proportion to recovery you would otherwise have allowed that the negligence of Plaintiff bears to the combined negligence of the Plaintiff and the Defendant.

[fol. 171] Special Issue No. 19:

Do you find from a preponderance of the evidence that the Plaintiff's injures were not the result of an unavoidable accident? Answer either "It was not the result of an unavoidable accident" or "It was the result of an unavoidable accident".

You are instructed that an unavoidable accident is one which occurred without any negligence on the part of the Plaintiff, Earl R. Deen, or the Defendant, Gulf, Colorado & Santa Fe Railway Company, proximately contributing thereto.

Answer: It was not the result of an unavoidable accident.

John R. Wood, Foreman.
A. O. Newman, Judge Presiding.

Filed April 13, 1954.

[fol. 172] In the District Court of Brown County, Texas.

[Title omitted.]

Defendant's Motion for Instructed Verdict—Filed April 13, 1954

To the Honorable Judge of Said Court:

Now comes Gulf, Colorado and Santa Fe Railway Company, a corporation, Defendant in the above entitled and numbered cause, and at the conclusion of the evidence and at the time designated for such purpose by the Court, files this its motion for instructed verdict, and in connection therewith, requests the Court to instruct the jury as follows:

You are instructed herein to return a verdict in favor of the Defendant and against the Plaintiff, Earl R. Deen, and

as grounds for said motion and request, would respectfully show the Court the following:

I.

There is no evidence in this case of any negligence on the part of the Defendant.

II.

There is no evidence in this case justifying the submission of any issue of proximate cause with regard to any act, omission or negligence of the Defendant.

III.

Undisputed evidence shows that the sole and only direct and proximate cause of Plaintiff's injuries were his own acts, ommissions and conduct, and Plaintiff cannot recover therefor against Defendant.

[fol. 173] IV.

The undisputed evidence shows that the Plaintiff was in charge of the work that was being done, that of his own volition and as a matter of his own decision, he selected the time when the work would be done, the method it was to be done, and the equipment with which it was to be done, and was not under the supervision or instruction of any other employee or foreman of the Defendant with regard thereto, and if there be any negligence in the way, manner, method or equipment incident to said work, it was the negligence of the Plaintiff himself.

V.

The only charge of negligence made in this case is that the Defendant failed to furnish a sufficient number of employees and under the evidence in this case, such issue cannot be submitted to the Jury for the reason that there were adequate employees and Plaintiff did not make any attempt to obtain assistance and under the Plaintiff's own testimony, it is undisputed that as far as the accident itself is concerned, additional employees could not and would not have prevented this happening.

VI.

Under the undisputed evidence in this case, the babbitt pot had been raised on edge by the Plaintiff and Snow and therefore, all of the allegations of negligence with reference to insufficient help or equipment or failure to instruct the Plaintiff have no bearing on the actual happening of this accident because under the undisputed evidence, [fol. 174] the sole and only cause of plaintiff being injured on the occasion in question was his putting his foot or let in a position where the babbitt could strike same, and he would have been in no danger and suffered no injury had it not been for placing his own foot in the wrong spot.

VII.

Under the undisputed evidence in this case, Plaintiff himself was in charge of said work and every decision, act, or omission which is or could be claimed to be negligence was the act or omission or negligence of Plaintiff himself for which there can be no recovery against this Defendant.

VIII.

In a case such as this, where the plaintiff himself is in charge of the work and selects the time, means, method and equipment and determines the number of servants necessary to do the work, there can be no recovery against Defendant in absence of proof of something defective in the equipment, place of work or other non-delegable duties, and therefore, Plaintiff has completely failed to make out a case of liability in this case.

IX.

Any negligence of the Defendant, if same exists, was not and could not be the proximate cause of Plaintiff's injuries because of the fact that he selected his own method of handling said job, the means by which it was accomplished, the number of servants to aid him and therefore his own acts constituted the direct and only proximate cause of his injuries and broke any chain of *causation* between Defendant's alleged negligence and the actual accident and injury.

[fol. 175]

X.

Undisputed evidence is that the job that Plaintiff was performing at the time he was injured, to-wit, getting the babbitt out of the pot, was a simple one, that there was no emergency and no time specified for said work to be done, and the defendant could not and did not reasonably anticipate that Plaintiff would select a way and method which would and did cause himself injury and therefore there being a complete lack of reasonable anticipation of consequences, no act or omission on the part of the Defendant was or could be the proximate cause of Plaintiff's injuries and alleged damages.

XI.

There being sufficient help available which Plaintiff, of his own volition, failed to summon, Defendant's duty or obligation to furnish sufficient help is fully discharged and no recovery can be had on that ground.

XII.

The alleged negligence based on the insufficiency of the crane was not and could not have been a proximate cause of Plaintiff's injuries because the crane had fulfilled its function and the pot was on the floor which is where Plaintiff desired to place same, and therefore, such grounds of alleged negligence furnishes no basis for Defendant's liability herein.

XIII.

The work which Plaintiff was doing, to-wit: getting the babbitt out of the babbitt pot, was a simple operation and the Plaintiff himself was an experienced man, thoroughly [fol. 176] familiar with his job, and therefore there was no duty or obligation on the part of Defendant to furnish supervision, instructions or lessons in methods or means of doing said work on the occasion in question and the allegation of negligence based on same is not supported by the evidence.

XIV.

There is no evidence in this case that the Defendant failed to furnish plaintiff a safe place to work or that the

place where Plaintiff was working was unsafe or in any way contributed to the alleged accident. There is no evidence of any defect in any equipment and therefore the allegations of improper inspection could not furnish a basis for negligence or a proximate cause of the alleged accident.

XV.

There is no evidence in this case that the Defendant failed to inspect the equipment and therefore same does not furnish a basis for negligence nor is there any evidence that failure to inspect was or could have been a proximate cause of Plaintiff's alleged injury.

XVI.

There is no evidence or any negligence on the part of the Defendant with reference to furnishing equipment to do the particular job the Plaintiff was doing at the time of his alleged injury and therefore same does not support a recovery against defendant on the ground.

Respectfully submitted,

Woodruff & Holloway, First National Bank Building, Brownwood, Texas,

Crowley, Hudson & Keltner, by Luther Hudson, Attorneys for the Defendant, Gulf, Colorado & Santa Fe Railway Company.

[fol. 177] The above and foregoing motion and request for an instructed verdict in favor of the Defendant was presented in writing by the Defendant to the court at the conclusion of the evidence and prior to the submission of any special issue herein and prior to the reading of the court's charge to the jury and at the time and place and in the manner specified for same by the Court, and the court certifies that same was presented at a proper time, place and in a proper manner and after being duly considered by the Court, was overruled, to which the Defendant in open Court excepted and objected.

A. O. Newman, Judge Presiding.

Filed Apr. 13, 1954.

[fol. 178] IN THE 35TH DISTRICT COURT OF BROWN COUNTY, TEXAS.

[Title omitted]

DEFENDANT'S EXCEPTIONS TO CHARGE OF THE COURT—FILED APRIL 13, 1954

Comes now the defendant, at the close of the testimony, and before the court has submitted his charge to the jury, and with due time presents and files the following objections and exceptions to the Court's charge in this case, as follows:

I.

The defendant objects and excepts to the Court's Charge and particularly to the definitions of the terms "Negligence" and "Ordinary Care" for the reason that same are not applicable to this case in that the defendant is only obligated by law to exercise care to furnish reasonably safe tools and appliances, and to furnish a reasonable number of employees, and the defendant was only obligated to have them reasonably available; and the definitions in the Court's Charge does not anywhere take into consideration the law that is applicable in this case as set out.

II.

The Defendant objects and excepts — the definition in the Court's charge of "Proximate Cause" for the reason the same omits "New and Independent Cause" which is raised by the evidence and is a necessary part of the definition of "Proximate Cause".

III.

The defendant objects and excepts to Special Issue No. 1 [fol. 179] of the Court's Charge for each of the following reasons, to-wit:

(a) There is no evidence justifying the submission to the jury of an issue as to the defendant's failure to furnish tools, proper or otherwise, in this case.

(b) Under the undisputed evidence in this case, the only

claim that other tools might have been designed is speculative and under the undisputed evidence there were not any tools in existence at or prior to the time that the plaintiff was injured, other than the tools that were used and which were usable, and the defendant is not required by law to furnish every kind of device and appliance that might be conceived by man, but is only required to exercise reasonable care to furnish reasonable tools to do the work.

(c) Said issue used the phrase "proper tools" which is a phrase which would have to be defined in a case of this nature, and it ignores the true test as to whether they were reasonably safe tools that were furnished, and the defendant requests the court to define "Proper Tools" as being such tools as a reasonably prudent man would have anticipated sufficient to do the job with reasonable safety.

(d) The defendant excepts to said Special Issue No. 1 because the same puts on the defendant an undue burden of proving proper tools were furnished without the court saying what tools the court has in mind; and the jury might answer such issue "Yes" of the jury, itself, can conceive of some device or tool that might have been used, and the Court does not limit said issue to the tools or devices which [fol. 180] the plaintff says might have been devised or furnished and therefore said issue is not confined to the evidence.

(e) The defendant further objects and excepts to Special Issue No. 1 for the reason that under the facts in this case there was no burden on this defendant to furnish any particular tool or appliance to remove the babbitt from the pot, which removal was a simple operation and could be accomplished without danger, and was an operation in which no special tool, device or appliance was necessary; and under the court's phrasing of said Issue No. 1, the jury is told that the defendant should have designed some device or tool, when, as a matter of fact, no tools are necessary, and in any event the defendant is entitled to have the issue submitted without the court commenting on the weight of the evidence as to whether additional tools were required or not.

IV.

The defendant objects and excepts to Special Issue No. 2, of the Court's Charge for each of the following reasons, to-wit:

(a) There is no evidence justifying the submission to the jury of an issue as to the defendant's failure to furnish tools, proper or otherwise, in this case.

(b) Under the undisputed evidence in this case, the only claim that other tools might have been designed is speculative and under the undisputed evidence there were not any tools in existence at or prior to the time that the plaintiff was injured, other than the tools that were used and where were usable and the defendant is not required by law to furnish every kind of device and applicance that [fol. 181] might be conceived by man, but is only required to exercise reasonable care to furnish reasonable tools to do the work.

(c) Said issue used the "proper tools" which is a phrase which would have to be defined in a case of this nature, and it ignores the true test as to whether they were furnished, and the defendant requests the court to define "Proper Tools" as being such tools as a reasonably prudent man would have anticipated sufficient to do the job with reasonable safety.

(d) The defendant excepts to said Special Issue No. 2 because the same puts on the defendant an undue burden of proving proper tools were furnished without the court saying what tools the court has in mind; and the jury might answer such issue "Yes" if the jury, itself, can conceive of some device or tool that might have been used, and the court does not limit said issue to the tools or devices which the plaintiff says might have been devised or furnished and therefore said issue is not confined to the evidence.

(3) The defendant further objects and excepts to Special Issue No. 2 for the reason that under the facts in this case there was no burden on this defendant to furnish any particular tool or appliance to remove the babbitt from the pot, which removal was a simple operation and could

be accomplished without danger, and was an operation in which no special tool, device, or appliance was necessary; and under the Court's phrasing of said Issue No. 2, the jury is told that the defendant should have designed some device or tool, when, as a matter of fact, no tools are necessary, and in any event the defendant is entitled to have the [fol. 182] issue submitted without the court commenting on the weight of the evidence as to whether additional tools were required or not.

V.

The defendant objects and excepts to Special Issue No. 3 for the reason that under the undisputed evidence in this case any failure to furnish any kind or character of tools was not and could not have been a proximate cause of the plaintiff's injuries, and any affirmative answer by the jury or finding by the jury in the affirmative in answer to said issue would be unsupported by the evidence.

VI.

The defendant objects and excepts to Special Issue No. 4 for each of the following reasons:

(a) There is no evidence to justify the submission to the jury of an issue of the failure to furnish to plaintiff one or more additional men, for the reason that under the undisputed evidence in this case men were available and the plaintiff preferred to do the work without additional help.

(b) Defendant further excepts to Issue No. 4 for the reason the same is not a proper submission of the issue of liability under the evidence in this case. If it is raised at all, the only issue with reference to insufficient help is not whether the defendant failed to furnish one or more additional men, but whether there was sufficient help available to do the job which he was required to do in the performance of his duties; and under the court's instruction, the [fol. 183] Jury is told that the defendant had an obligation to furnish one or more men, when, under the law, it is not required to furnish men, but merely to have them avail-

able, and therefore said issue puts more burden on the defendant than does the law, and is submitted in a manner that is highly prejudicial to the defendant.

(c) Defendant further excepts to said issue for the reason the same assumes that there was a duty on the defendant to furnish one or more additional men, and the said issue is therefore on the weight of the evidence; and the defendant requests the court to submit to the jury an issue No. 3-A as follows:

"Do you find from a preponderance of the evidence that there were other employees reasonably available to the plaintiff reasonably sufficient to accomplish the work on which he was engaged? Answer yes or no." and to condition the answering of Issues 4, 5 and 6, upon a negative answer to such requested issue No. 3A.

(d) Defendant further excepts to said Issue No. 4 for the reason the same is erroneous in that by using the phrase: "Furnish one or more additional men to the plaintiff" the court is informing the jury that the defendant had an obligation to do so, which is one of the issues of liability; and the defendant is entitled to have the same submitted separately and not in conjunction with and part of Issue No. 4.

VII.

The defendant objects and excepts to Special Issue No. 5 for each of the following reasons:

[fol. 184] (a) There is no evidence to justify the submission to the jury of an issue of the failure to furnish to the plaintiff one or more additional men, for the reason that under the undisputed evidence in this case men were available and the plaintiff preferred to do the work without additional help.

(b) Defendant further excepts to Issue No. 5 for the reason the same is not a proper submission of the issue of liability under the evidence in this case. If it is raised at all, the only issue with reference to insufficient help is not whether the defendant failed to furnish one or more additional men, but whether there was sufficient help available to do the job which he was required to do in the

performance of his duties; and under the court's instruction, the jury is told that the defendant had an obligation to furnish one or more men, when, under the law, it is not required to furnish men, but merely to have them available, and therefore said issue puts more burden on the defendant than does the law, and is submitted in a manner that is highly prejudicial to the defendant.

(c) Defendant further excepts said issue for the reason the same assumes that there was a duty on the defendant to furnish one or more additional men, and the said issue is therefore on the weight of the evidence; and the defendant therefore requests the court to submit to the Jury and Issue No. 3A as follows:

"Do you find from a preponderance of the evidence that there were other employees reasonably available to the plaintiff reasonably sufficient to accomplish the work on which he was engaged? Answer yes or no", and to [fol. 185] *and to* condition the answering of Issues 4, 5, and 6, upon a negative *negative* answer to such request Issue No. 3A.

(d) Defendant further excepts to said Issue No. 5 for the reason the same is erroneous in that by using the phrase; "Furnish one or more additional men to the plaintiff" the court is informing the jury that the defendant had no obligation to do so, which is one of the issues of liability; and the defendant is entitled to have the same submitted separately and not in conjunction with and part of Issue No. 5.

VIII.

Defendant objects and excepts to special Issue No. 6, for the reason that under the undisputed evidence the failure to furnish one or more additional men was not and could not be a proximate cause of plaintiff's injuries.

IX.

Defendant objects and excepts to Special Issue No. 7 for each of the following reasons:

(a) There is no evidence in this case justifying the submission of the question of failure of defendant to give proper supervision.

(b) Said Issue No. 7 is on the weight of the evisence for reason that same assumes that the plaintiff needed supervision, when under his own testimony he had done the same job several times before, and that he was an experienced man and knew as much or more about doing that particular job than anybody else working for the defendant in the shop; and said issue is therefore on the weight of the evidence and ignores and assumes an *assumes an* issuable fact in this case.

[fol. 186] (c) Said Issue No. 7, is further objectionable in that it uses the phrase "Proper Supervision" which is a legal phrase and should be defined; and if the court is of the opinion that said Issue No. 7 should be given, then the defendant requests the Court to define the phrase "Proper Supervision" as being such supervision as an ordinary prudent man would have given the plaintiff under the same and similar circumstances.

(d) Said Issue No. 7, by using the phrase "Proper Supervision" places a greater burden on the defendant than the law permits for the reason that the law only requires that an employee be supervised when he is doing something that he is not familiar, or in the case of inexperience, or when doing something difficult or unduly dangerous about his work, and under the facts in this case none of those situations existed, and the court in using the phrase "Proper Supervision" tells the jury that the defendant was required to have supervision over the plaintiff in doing any job however simple.

X.

Defendant objects and excepts to Special Issue No. 8 for each of the following reasons:

(a) There is no evidence in this case justifying the submission of the Question of defendant to give proper supervision.

(b) Said Issue No. 8 is on the weight of the evidence for the reason that same assumes that the plaintiff needed supervision, when under his own testimony he had done the [fol. 187] same job several times before, and that he was an experienced man and knew as much or more about doing

that particular job than anybody else working for the defendant in the shop; and said issue is therefore on the weight of the evidence and ignores and assumes an issuable fact in this case.

(c) Said Issue No. 8 is further objectionable in that it uses the phrase "Proper Supervision" which is a legal phrase and should be defined; and if the court is of the opinion that said Issue No. 8, should be given, then the defendant requests the court to define the phrase "Proper Supervision" as being such supervision as an ordinary prudent man would have given the plaintiff under the same and similar circumstances.

(d) Said Issue No. 8, by using the phrase "Proper Supervision" places a greater burden on the defendant than the law permits for the reason that the law only requires that an employee be supervised when he is doing something that he is not familiar, or in the case of inexperience, or when doing something difficult or unduly dangerous about his work; and under the facts in this case none of those situations existed, and the court, in using the phrase, "Proper Supervision", tells the jury that the defendant was required to have supervision over the plaintiff in doing any job however simple.

XI.

Defendant objects and excepts to Special Issue No. 9 of the Court's charge for the reason that under the undisputed evidence in this case the alleged failure to give proper supervision was not and could not have been a proximate cause of the plaintiff's injuries.

[fol. 188]

XII.

Defendant objects and excepts to Special Issue No. 17 of the Court's charge and instructions on the measure of damages in connection therewith for the reason that under the court's charge the jury is instructed only to discount future recovery, whereas, under the Federal Employment Act and under the Supreme Court decisions thereunder all payments are discounted on present payment.

XIII.

Defendant further objects and excepts to Special Issue No. 17 and to the Court's submission of damage for each of the following reasons:

(a) The court's definition or instruction fails to inform the jury that the recovery in this case is not subject to Income Taxes and therefore they may take such absence from burden of taxes into consideration in determining the amount if any is allowed.

(b) Said Issue is further erroneous in that under the undisputed evidence the plaintiff has worked for four years since his injury for the defendant, drawing a higher rate of hourly pay than he got at the time he was injured, and under his own testimony, he has worked as steadily as any of the other employees, and under such circumstances the court will have to confine any recovery to the time while he was off from work and cannot by his charge permit a recovery which would overlap and include the four years that plaintiff has been working for the defendant, or any part thereof, and drawing his full pay for each and every day; and by the charge the court does not in any way or manner inform the jury they cannot allow double recovery, nor allow the plaintiff damages while he [fol. 189-190] has been working steadily and drawing a higher pay than he drew at the time of the injury; and the defendant requests the court to limit any recovery for loss of time in the past to the period between the date of the injury and the 3rd day of April, 1950, being the date the plaintiff returned to work.

Respectfully submitted, Luther Hudson, Crowley, Hudson & Keltner, By Luther Hudson. Woodruff & Holloway, By R. R. Holloway. Attorneys for Defendant.

The foregoing objections and exceptions were duly and timely presented to the court and to counsel for the plaintiff after the testimony had closed and after the court had prepared his charge to the jury, and prior to the submission of said charge to the jury; and said objections and

exceptions were by the court overruled, and the defendant duly excepted in open court.

A. O. Newman, Judge Presiding.

Filed April 13, 1954

[fol. 191] IN THE DISTRICT COURT OF
BROWN COUNTY, TEXAS

[Title omitted]

To the Honorable Judge of Said Court:

DEFENDANT'S REQUESTED ISSUE No. 3—Filed April 13, 1954

Defendant respectfully requests the court to submit the following issues:

a. Do you find from a preponderance of the evidence that the Plaintiff was negligent in the manner and method used in doing the work at the time of his sustaining his injuries?

Answer Yes or No.

Answer ——

If you have answered the foregoing question "Yes", then answer the following. If you have answered it "no", you need not answer the following.

b. Do you find from a preponderance of the evidence that the negligence of the Plaintiff, if any you have found, inquired about in the preceding issue, was the proximate cause of his injuries?

Answer Yes or No.

Answer ——

Respectfully submitted, Woodruff & Holloway, Crowley, Hudson & Keltner, Attorneys for Defendant, Gulf, Colorado & Santa Fe Railway Company.

[fol. 192] The above and foregoing special issues were requested by the Defendant after the conclusion of the evidence and before the preparation of the court's main charge

in writing and after being duly considered by the court and opposing counsel, were

Refused ——.

It is here certified that the above issues were requested in writing at the proper time, proper place and and in a proper manner, and at the time, place and in the manner specified by the court for such purpose. The Defendants requested each of the above issues separately as well as jointly and the court ruled that the Defendant need not submit each of same on a separate piece of paper but same would be considered as though they had been separately as well jointly.

A. O. Newman, Judge Presiding.

Filed April 13, 1954

[fol. 193] Defendant's Requested Issue No. 4.

Defendant respectfully requests the court to submit the following issues:

a. Do you find from a preponderance of the evidence that the Plaintiff Deen was negligent in failing to obtain additional help to do the work he was doing at the time he received his injuries?

Answer Yes or No.

Answer ——

If you have answered the foregoing question "Yes", then answer the following. If you have answered it "No", you need not answer the following:

b. Do you find from a preponderance of the evidence that the negligence, if any, of Plaintiff inquired about in the preceding issue was the proximate cause of his injuries?

Answer Yes or No.

Answer ——

Respectfully submitted, Woodruff & Holloway, Crowley, Hudson & Keltner, Attorneys for Defendant, Gulf, Colorado & Santa Fe Railway Company.

[fol. 194] The above and foregoing special issues were requested by the Defendant after the conclusion of the evi-

dence and before the preparation of the court's main charge in writing and after being duly considered by the Court and opposing counsel, were

Refused ——.

It is here certified that the above issues were requested in writing at the proper time, proper place and in a proper manner, and at the time, place and in the manner specified by the court for such purpose. The Defendants requested each of the above issues separately as well as jointly and the court ruled that the Defendant need not submit each of same on a separate piece of paper same would be considered as though they had been separately requested as well as jointly.

A. O. Newman, Judge Presiding.

[fol. 195] DEFENDANT'S REQUESTED ISSUE No. 5

Defendant respectfully requests the court to submit the following issues:

a. Do you find from a preponderance of the evidence that the Plaintiff Deen was negligent on the case in question in placing his foot where the babbitt could and did strike same?

Answer Yes or No.

Answer ——

If you have answered the foregoing question "Yes", then answer the following. If you have *it* answered it "No", you need not answer the following:

b. Do you find from a preponderance of the evidence that the negligence, if any, of the Plaintiff inquired about in the preceding issue was a proximate cause of his injuries?

Answer Yes or No.

Answer ——

Respectfully submitted, Woodruff & Holloway, Crowley, Hudson & Keltner, Attorneys for Defendant, Gulf, Colorado & Santa Fe Railway Company.

[fol.196] The above and foregoing special issues were requested by the Defendant after the conclusion of the evi-

dence and before the preparation of the court's main charge in writing and after being duly considered by the court and opposing counsel, were

Refused ——.

It is here certified that the above issues were requested in writing at the proper time, proper place and in a proper manner, and at the time, place and in the manner specified by the court for such purpose. The Defendants requested each of the above issues separately as well as jointly and the court ruled that the Defendant need not submit each of same on a separate piece of paper but same would be considered as though they had been separately requested as well as jointly.

A. O. Newman, Judge Presiding.

Filed April 13, 1954

[fol. 197] Defendant's Requested Issue No. 6.

Defendant respectfully requests the court to submit the following issues:

a. Do you find from a preponderance of the evidence that the plaintiff was negligent in the use of the equipment he selected on the occasion when he sustained his alleged injuries?

Answer Yes or No.

Answer ——

If you have answered the foregoing question "Yes", then answer the following. If you have answered it "No", you need not answer the following:

b. Do you find from a preponderance of the evidence that the negligence, if any, of the Plaintiff inquired about in the preceding issue was the proximate cause of his injuries?

Answer Yes or No.

Answer ——.

Respectfully submitted, Woodruff & Holloway, Crowley, Hudson & Keltner, Attorneys for Defendant, Gulf, Colorado & Santa Fe Railway Company.

The above and foregoing special issues were requested by the Defendant after the conclusion of the evidence and before the preparation of the court's main charge in writing and after being duly considered by the court and opposing counsel, were

Refused ——.

[fol. 198] It is here certified that the above issues were requested in writing at the proper time, proper place and in a proper manner, and at the time, place and in the manner specified by the court for such purpose. The Defendants requested each of the above issues separately as well as jointly and the court ruled that the Defendant need not submit each of same on a separate piece of paper but same would be considered as though they had been separately requested as well as jointly.

A. O. Newman, Judge Presiding.

Filed April 13, 1954

[fol. 199] Defendant's Requested Issue No. 7.

Defendant respectfully requests the court to submit the following issues:

a. Do you find from a preponderance of the evidence that the Plaintiff failed to ask for instruction as to how he should do the work which he was doing at the time he sustained his injury?

Answer Yes or No.

Answer ——

If you have answered the foregoing question "Yes", then answer the following. If you have answered it "No", then you need not answer the following:

b. Do you find from a preponderance of the evidence that the failure of Plaintiff to ask for instructions as inquired about in the preceding issue was negligence on his part?

Answer Yes or No.

Answer ——

If you have answered the foregoing question "Yes", then answer the following. If you have answered it "no", then you need not answer the following.

c. Do you find from a preponderance of the evidence that the negligence, if any, on the part of the plaintiff as inquired about in the preceding issue was a proximate cause of his injuries.

Answer Yes or No.

Answer ——.

[fol. 200]

Respectfully submitted, Woodruff & Holloway, Crowley, Hudson & Keltner, Attorneys for Defendant, Gulf, Colorado & Santa Fe Railway Company.

The above and foregoing special issues were requested by the Defendant after the conclusion of the evidence and before the preparation of the court's main charge in writing and after being duly considered by the court and opposing counsel, were

Refused ——.

It is here certified that the above issues were requested in writing at the proper time, proper place and in a proper manner, and at the time, place and in the manner specified by the court for such purpose. The Defendants requested each of the above issues separately as well as jointly and the court ruled that the Defendant need not submit each of same on a separate piece of paper but same would be considered as though they had been separately requested as well as jointly.

A. O. Newman, Judge Presiding.

Filed April 13, 1954

[fol. 201] Defendant's Requested Issue No. 8.

Defendant respectfully requests the court to submit the following issue:

Do you find from a preponderance of the evidence that the work plaintiff was doing at the time he was injured was simple and that the danger of the injury which he sustained was open and obvious?

Answer Yes or No.
Answer ——.

Respectfully submitted, Woodruff & Holloway, Crowley, Hudson & Keltner, Attorneys for Defendant, Gulf, Colorado & Santa Fe Railway Company.

The above and foregoing special issue was requested by the Defendant after the conclusion of the evidence and before the preparation of the court's main charge in writing and after being duly considered by the court and opposing counsel, was
Refused ——.

It is here certified that the above issue was requested in writing at the proper time, place and in the manner specified by the court for such purpose.

A. O. Newman, Judge Presiding.

Filed April 13, 1954

[fol. 202] DEFENDANT'S REQUESTED ISSUE NO. 9.

Defendant respectfully requests the court to submit the following issue:

Do you find from a preponderance of the evidence that the defendant railway company and its supervisory employees should have reasonably anticipated that the Plaintiff would perform the work which caused his injury in the way and manner in which he did do it?
Answer Yes or No.
Answer ——.

Respectfully submitted, Woodruff & Holloway, Crowley, Hudson & Keltner, Attorneys for Defendant, Gulf, Colorado & Santa Fe Railway Company.

The above and foregoing special issue was requested by the Defendant after the conclusion of the evidence and before the preparation of the court's main charge in writing and after being duly considered by the court and opposing counsel, it was
Refused ——.

It is here certified that the above issue was requested in writing at the proper time, proper place and in a proper manner, and at the time, place and in the manner specified by the Court for such purpose.

A. O. Newman, Judge Presiding.

Filed April 13, 1954

[fol. 203] DEFENDANT'S REQUESTED EXPLANATORY INSTRUCTION No 10.

In connection with the issue of damages herein, Defendant requests the court to submit the following:

If you have answered any of the issues in this charge to the effect that the Plaintiff Deen was negligent and that his negligence proximately caused the accident and his injuries, then you will answer the following issue:

What sum do you find from a preponderance of the evidence, should the recovery you have allowed herein (if you have allowed any) should be reduced by reason of the contributory negligence of the Plaintiff Deen?

Answer in dollars and cents.

Answer ——.

In determining the amount Plaintiff's recovery should be reduced, you are instructed that if you have found any negligence on his part and if you have found any negligence on the part of the Defendant, you should reduce said recovery by an amount which bears the same proportion to recovery you would otherwise have allowed that the negligence of Plaintiff bears to the combined negligence of the Plaintiff and the Defendant.

Respectfully submitted, Woodruff & Holloway, Crowley, Hudson & Keltner, Attorneys for Defendant, Gulf, Colorado & Santa Fe Railway Company.

Filed April 13, 1954

[fol. 204] The above explanatory instruction was presented by the Defendant to the court in writing before the submission of the charge to the jury and after being duly considered by the Court and opposing counsel, was

Refused ——.

It is here certified that the above was requested at a proper time, proper place and in a proper manner and at the time, place and manner specified for such purpose by the Court.

A. O. Newman, Judge Presiding.

Filed April 13, 1954

[fol. 205] DEFENDANT'S REQUESTED EXPLANATORY INSTRUCTION No. 11

The Defendant requests the Court to instruct the jury in connection with the measure of damage herein as follows:

Under the evidence in this case, you cannot allow the Plaintiff anything for medical expenses, doctor's bills, nursing, hospitalization, or anything for that character.

Respectfully requested, Woodruff & Holloway, Crowley, Hudson & Keltner, Attorneys for Defendant, Gulf, Colorado & Santa Fe Railway Company.

The above explanatory instruction was presented by the Defendant to the Court in writing before the submission of the charge to the jury and after being duly considered by the court and opposing counsel, was

Refused ——.

It is here certified that the above was requested at a proper time, proper place and in a proper manner and at the time, place and manner specified for such purpose by the court.

A. O. Newman, Judge Presiding.

Filed April 13, 1954

[fol. 206] DEFENDANT'S REQUESTED EXPLANATORY INSTRUCTION No. 12

The Defendant requests the court to submit the following explanatory instruction:

In connection with the issue on damages herein, Defendant requests the court to instruct the Jury as follows:

You are instructed herein that the amount which you allow the Plaintiff, if any you do allow, will not be subject

to federal or State income taxes, and you may consider such fact in determining the damages.

Respectfully requested, Woodruff & Holloway, Crowley, Hudson & Keltner, Attorneys for Defendant, Gulf, Colorado & Santa Fe Railway Company.

The above explanatory instruction was presented by the Defendant to the Court in writing before the submission of the charge to the jury and after being duly considered by the court and opposing counsel, was

Refused ——.

It is here certified that the above was requested at a proper time, proper place and in a proper manner and at the time, place and manner specified for such purpose by the court.

A. O. Newman, Judge Presiding.

Filed April 13, 1954

[fol. 207] DEFENDANT'S REQUESTED EXPLANATORY INSTRUCTION No. 13

In connection with the measure of damage herein, Defendant requests the court to instruct the jury as follows:

You cannot allow the Plaintiff any sum of money for his alleged loss of earnings after the time he went back to work for the Defendant.

Respectfully requested, Woodruff & Holloway, Crowley, Hudson & Keltner, Attorneys for Defendant, Gulf, Colorado & Santa Fe Railway Company.

The above explanatory instruction was presented by the Defendant to the Court in writing before the submission of the charge to the jury and after being duly considered by the Court and opposing counsel, was

Refused ——.

It is here certified that the above was requested at a proper time, proper place and in a proper manner and at the time, place and manner specified for such purpose by the court.

A. O. Newman, Judge Presiding.

Filed April 13, 1954

[fol. 208] DEFENDANT'S REQUESTED ISSUE NO. 14

Defendant respectfully requests the court to submit the following issue:

Do you find from a preponderance of the evidence that the Plaintiff's injuries were not the result of an unavoidable accident?

You are instructed that an unavoidable accident is one which occurred without any negligence on the part of the Plaintiff, Earl R. Dean, or the Defendant, Gulf, Colorado & Santa Fe Railway Company, proximately contributing thereto.

You will answer the foregoing issue "It was an unavoidable accident or it was not an unavoidable accident", and unless you find from a preponderance of the evidence that it was not an unavoidable accident, you will answer "It was an unavoidable accident."

Answer ——.

Respectfully submitted, Woodruff & Holloway, Crowley, Hudson & Keltner, Attorneys for Defendant, Gulf, Colorado & Santa Fe Railway Company.

The above and foregoing special issue was requested by the Defendant after the conclusion of the evidence and before the preparation of the Court's main charge in writing and after being duly considered by the court and opposing counsel, was

Refused ——.

[fol. 209] It is here certified that the above issue was requested in writing at the proper time, proper place and in a proper manner, and at the time, place and in the manner specified by the court for such purpose.

A. O. Newman, Judge Presiding.

Filed April 13, 1954

[fol. 210-217] IN THE DISTRICT COURT OF BROWN COUNTY, TEXAS.

35TH JUDICIAL DISTRICT

[Title omitted]

DEFENDANT'S MOTION FOR JUDGMENT ON JURY'S VERDICT

Filed April 19, 1954

To the Honorable Judge of said Court:

Now comes Gulf, Colorado and Santa Fe Railway Company, Defendant in the above entitled and numbered cause, and presents this, its Motion for Judgment on the Jury's Verdict, and its Motion for Judgment on Said Verdict, Disregarding Issues 1, 2 and 3 therein, and for grounds, respectfully shows the Court the following:

1.

The above entitled and numbered cause came on for trial on April 12, 1954, both sides rested on April 13, 1954, and the Court thereupon overruled Defendant's Motion for an Instructed Verdict and submitted to the Jury said case upon special issues, and on April 14, 1954, the jury returned a verdict consisting of the issues and answers as follows:

[fol. 218] 2.

The Defendant above named is entitled, on such verdict, to have Judgment in its favor for each of the following reasons:

A. Plaintiff having testified that with adequate help the babbitt could have been removed safely in a manner that did not require additional tools, and the jury by its findings having determined that the Defendant did furnish adequate help or assistance to the Plaintiff, and that the Plaintiff was negligent in failing to obtain such additional help, the findings of the jury to Issues 1, 2, and 3, to the effect that the Defendant was negligent in not furnishing proper tools to remove the babbitt, were and are immaterial because an

employer is not liable when he has furnished help adequate to do the work with safety, and the employee voluntarily proceeds to do the work without such assistance.

B. Under the Jury's findings, as above set out, that the defendant furnished adequate help to perform said work in safety, and that the plaintiff was negligent in not getting such additional help, the defendant is entitled to judgment in its favor, irrespective of the findings in Answers to [fol. 219] Issues 1, 2 and 3, because the defendant is not under the obligation both to furnish adequate help to do the work in safety without additional tools, and to furnish any special tools or appliances to do the work with safety without such help, and, therefore Issues 1, 2 and 3 are immaterial, and by said verdict, defendant has been absolved of all liability under the law.

C. There being no evidence that it was necessary to have both additional help and additional tools, and under the jury's verdict, as above set out, and Defendant having furnished adequate help to do such work in safety and the Plaintiff having negligently failed to avail himself of such help, and voluntarily proceeded to perform same without any requirement by the Defendant, without adequate help, Defendant could not have reasonably anticipated that the Plaintiff would perform same without such adequate help, or would negligently fail to call same, and, therefore, the findings of the jury to Issues 1, 2 and 3 are immaterial.

D. Under the undisputed facts in this case, the Plaintiff himself was in charge of the said work, was thoroughly experienced, and knew at least as much about the job as anybody else, had done it several times with perfect safety and without injury when he had adequate help, and under said jury's findings, said help was furnished to him but he negligently failed to call for it or ask for it, and under such circumstances, there was no duty or obligation upon the Defendant to furnish any special tools or appliances, and, therefore, Issues 1, 2 and 3 are immaterial and Defendant is entitled to judgment.

[fol. 220]

That the Jury's findings in response to Issues 1, 2, and 3, as above set out, should in all things be disregarded and

judgment on the remaining findings, as above set out, be entered in favor of the Defendant for each of the following reasons:

A. The finding of the jury in response to Special Issue No. 1 is without support in the evidence.

B. The finding of the jury in answer to Special Issue No. 2 is without support in the evidence.

C. The finding of the jury in response to Special Issue No. 3 is without evidence to support it.

D. Under the undisputed evidence in this case, there was no tool or appliance in existence or known at the time of the alleged accident, which the Defendant could have or should have furnished to the Plaintiff to remove the babbitt. The only tools and appliances mentioned in the evidence are some type of clamp which the Plaintiff thought could be manufactured and which he admitted might be dangerous to use, and some system of boring holes and inserting a manufactured eye bolt, as described by the witness, Snow, and neither of said alleged appliances or tools was in existence, nor is there any evidence that same had ever been used or could be used with safety or that they would be safer than turning over said pot with the adequate help furnished to the Plaintiff.

E. Under the law, the Defendant is not obligated to furnish the best or newest, or even the safest tools, and as long as it has furnished a proper and safe way to accomplish the work, in this case, adequate available help and assistance, it has no duty or obligation to adopt or furnish some new or different tool or appliance.

[fol. 221] F. The jury's answer to said issues could be based only on speculation or conjecture, because under the undisputed evidence there was no known tool or any appliance in common use to perform said work; therefore, any conclusion that there was such a tool or that it was negligence not to furnish it, would necessarily be based on speculation as to the safety or suitability or effectiveness of some new and untried tool or appliance.

G. Under the evidence in this case and under the Jury's findings as above set out, the Defendant furnished to Plaintiff adequate help and the Plaintiff was negligent in not

using same, and it is undisputed that with such adequate help the Plaintiff himself had performed this same operation with perfect safety on at least three, and probably more, prior occasions, and under such state of record, the finding that tools were necessary or that it was negligence not to furnish same, is wholly unsupported by the record.

H. Under the undisputed evidence in this case, there is no evidence that the Plaintiff would have used any such tools or appliances, assuming that same could hace been furnished or that there were any in existence that should have been furnished, and, therefore, the jury's finding that the failure to furnish same was a proximate cause (Special Issue No. 3) in the absence of some evidence indicating that the Plaintiff would, or at least probably would have used same on the occasion in question, is wholly unsupported by the evidence.

I. The only tool or appliance mentioned in the evidence in this case are some which were thought up after the alleged accident by the Plaintiff and by Snow, neither of which had ever been tried, nor their feasibility or safety determined, and under the law, the Defendant would be [fol. 222] guilty of negligence to furnish and require the use by an employee of a new and untested tool or appliance, particularly where, under the undisputed evidence, there was a safe way to do said work with adequate help available, with no danger existing.

J. Under the undisputed evidence, the operation was a simple one, merely turning over a tub or vat or pot which contained some heavy babbitt metal. Plaintiff was a thoroughly experienced man in charge of said operation and the one to whom the decision was left as to the way and manner in which said work was done. He had performed said work with safety on numerous other occasions manually, and under the jury's findings as above set out, the help was available to him to do it again in the same way and manner and he was negligent in not asking for additional help, and under such undisputed set of facts and circumstances, as a matter of law, it is not negligence to fail to design or furnish special tools or equipment to do the work which could be done with safety in the usual way and manner.

K. Under the law there is no duty or obligation upon the Defendant to furnish several safe ways to do any work and under the undisputed evidence in this case, there was a way to do said work in reasonable safety, to-wit, turning same over manually, with adequate help, and under the jury's findings above set out, said help was available to the Plaintiff and he was negligent in not availing himself thereof, and, therefore, under such set of circumstances there was no duty upon the Defendant to furnish or design tools or appliances to do said work in some other fashion.

L. Said Issues 1, 2 and 3 assume that there was a duty [fol. 223] or obligation upon the Defendant to furnish the plaintiff tools so that he could do the work alone with safety, when under the law, all the Defendant was obligated to do was to furnish a method or means by which said work could be done with reasonable safety, and under the undisputed evidence, there was such a means, to-wit, doing same manually with adequate help, and under said jury's findings, said adequate help was available and Plaintiff was negligent in not availing himself of such help and therefore, the jury's findings are wholly unsupported by the evidence and contrary to law.

Wherefore, Premises Considered, the Defendant, Gulf, Colorado and Santa Fe Railway Company prays that notice of this Motion be given, as required by law, and that on hearing of same, the Court granted same and that the Court enter judgment for the Defendant on said verdict, or in the alternative, that the Court, on said hearing, disregard the jury's answer in Special Issue No. 1, or in answer to Special Issue No. 1, or in answer to Special Issue No. 3, or in answer to Special Issues 1, 2 and 3, and that judgment be entered for the Defendant upon the remaining findings of said jury, or for such other relief as seems just to the Court under the circumstances.

Respectfully submitted, Woodruff & Holloway, Brownwood, Texas. Crowley, Hudson & Keltner, By Luther Hudson, 1313 Continental Life Building, Fort Worth, Texas. Attorneys for Defendant Gulf, Colorado & Santa Fe Railway Company.

[fol. 224] I, the undersigned attorney for the Plaintiff in the above entitled and numbered cause, acknowledge receipt of a copy of the foregoing motion on this the 19 day of April, 1954, and waive formal service of said motion or a certified copy of same, and accept this as proper notice and service thereof and agree that said motion may be heard by the Court on April 26, 1954, at 10 A. M., or any date thereafter which the Court may determine.

David J. Morris, Attorney for the Plaintiff, Earl R. Deen.

Filed April 19, 1954

[fol. 225] In the 35th Judicial District Court of Brown County, Texas

Earl R. Deen

vs.

Gulf, Colorado and Santa Fe Railway Company

Judgment—Entered April 12, 1954

On the 12th day of April, 1954, came on to be heard the above entitled and numbered cause wherein Earl R. Deen is Plaintiff and the Gulf, Colorado & Santa Fe Railway Company is Defendant, came the Plaintiff and Defendant and both announced ready for trial, the Defendant urging by virtue of its second amended original answer in paragraph I of same an ex-ception to the allegation in Paragraph IV of Plaintiff's Petition wherein it is alleged that the Company failed to furnish "proper tools" and the Court having heard the same over-ruled Defendant's Special Exception which Defendant in open Court duly excepted; came a jury of twelve good and lawful men who being duly impaneled and sworn and having heard the pleadings, evidence and argument of counsel, after retiring to the Jury Room and electing as their foreman John R. Wood, and after due deliberations of the evidence and argument of counsel did on the 14th day of April, 1954, return the following verdict on their oath and answer to special issue submitted by the Court:

SPECIAL ISSUE No. 1:

Do you find from a preponderance of the evidence that Defendant failed to furnish Plaintiff with proper tools to remove the babbitt from the melting pot at the time and on the occasion in question?

Answer: Yes or No.

Answer: Yes.

(S.) John R. Wood, Foreman.

[fol. 226] If you have answered Issue No. 1 "Yes", and only in that event, then you will answer Issue No. 2.

SPECIAL ISSUE No. 2.

Do you find from a preponderance of the evidence that the failure of the Defendant to furnish Plaintiff with the proper tools to remove the babbitt was negligence?

Answer: Yes or No.

Answer: Yes.

(S.) John R. Wood, Foreman.

If you have answered Issue No. 2 "Yes", and only in that event, then you will answer Issue No. 3.

SPECIAL ISSUE No. 3:

Do you find from a preponderance of the evidence that such negligence, if any, you have found in answer to Issue No. 2, was proximate cause of the injuries, if any, in question to the Plaintiff?

Answer: Yes or No.

Answer: Yes.

(S.) John R. Wood, Foreman.

SPECIAL ISSUE No. 4:

Do you find from a preponderance of the evidence that the Defendant failed to furnish one or more additional men to Plaintiff, other than Snow, to assist Plaintiff in removing the babbitt from the melting pot at the time and on the occasion in question?

Answer: Yes or No.

Answer: No.

(S.) John R. Wood, Foreman.

If you have answered Issue No. 4 "Yes", and only in that event then you will answer Issue No. 5.

[fol. 227] Special Issue No. 5:

Do you find from a preponderance of the evidence that the failure of Defendant to furnish one or more additional men to Plaintiff, other than Snow, to assist Plaintiff in removing the babbitt, if you have so found, was negligence?

Answer: Yes or No.

Answer ——.

——, Foreman.

If you have answered Issue No. 5 "Yes", and only in that, then you will answer Issue No. 6.

Special Issue No. 6:

Do you find from the preponderance of the evidence that such negligence, if any you have found in answer to issue No. 5, was a proximate to cause of the injuries, if any, to Plaintiff?

Answer: Yes or No.

Answer ——.

——, Foreman.

Special Issue No. 7:

Do you find from a preponderance of the evidence that the defendant failed to give to plaintiff proper supervision at the time and on the occasion in question.

Answer: Yes or No.

Answer: No.

(S.) John R. Wood, Foreman.

If you have answered Issue No. 7 "Yes", and only in that event, then you will answer Issue No. 8.

Special Issue No. 8:

Do you find from the preponderance of the evidence that defendant's failure to give to Plaintiff proper supervision, if you have so found, was negligence?

[fol. 228] Answer: Yes or No.

Answer ——.

——, Foreman.

If you have answered Issue No. 8 "Yes", and only in that event, then you will answer Issue No. 9.

SPECIAL ISSUE No. 9.

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to Issue No. 8, was a proximate cause of the injuries, if any, to the plaintiff?

Answer: Yes or No.

Answer ——.

——, Foreman.

SPECIAL ISSUE No. 10.

Do you find from a preponderance of the evidence that the plaintiff Deen was negligent in failing to obtain additional help to do the work he was doing at the time he received his injuries?

Answer: Yes or No.

Answer: Yes.

(S.) John R. Wood, Foreman.

If you have answered Special Issue No. 10 "Yes", and in that event only, you will answer the following Issue No. 11.

SPECIAL ISSUE No. 11:

Do you find from a preponderance of the evidence that the negligence, if any, of Plaintiff inquired about in Special Issue No. 10 was a proximate cause of his injuries.

Answer: Yes or No.

Answer: Yes.

(S.) John R. Wood, Foreman.

[fol. 229] SPECIAL ISSUE No. 13:

Do you find from a preponderance of the evidence that the plaintiff was negligent in the manner and method used in doing the work at the time of his sustaining his injuries?

Answer: Yes or No.

Answer: No.

(S.) John R. Wood, Foreman.

If you have answered Special Issue No. 13 "Yes", and in that event only, you will answer the following issue No. 14.

SPECIAL ISSUE No. 14:

Do you find from a preponderance of the evidence that the negligence of the plaintiff, if any you have found, inquired about in the preceding Issue No. 13, was a proximate cause of his injuries?

Answer: Yes or No.

Answer: ——.

——, Foreman.

SPECIAL ISSUE No. 15:

Do you find from a preponderance of the evidence that the defendant railway company and its supervisory *explov* should have reasonably anticipated that the Plaintiff would perform the work which caused his injuries in the way and manner in which he did do it?

Answer: Yes or No.

Answer: Yes

(S.) John R. Wood, Foreman.

[fol. 230] SPECIAL ISSUE No. 16:

Do you find from a preponderance of the evidence that the sole proximate cause of Plaintiff's Injuries, was not due to his own acts and conduct?

Answer either: "It is was not the sole proximate cause of his injuries" or

"It was the sole proximate cause of his injuries".

Answer: "It was not the sole proximate cause of his injuries".

(S.) John R. Wood, Foreman.

SPECIAL ISSUE No. 17:

What amount of money, if any, if paid now in cash, do you find from a preponderance of the evidence, will fairly and reasonably compensate the Plaintiff for the injuries, if any, sustained by him on July 12, 1949, on the occasion in question?

Answer in Dollars and cents, if any or none.

Answer: $39,000.

(S.) John R. Wood, Foreman.

In answering the above and foregoing issue, you may take into consideration the nature, character and extent of the injuries, if any sustained by Plaintiff upon the occasion in question: also any physical pain and suffering, if any, which you may find from a preponderance of the evidence the Plaintiff has undergone as a direct result of such injuries from the date of such injuries up to this time; also any physical pain and suffering, if any, which you may find from a preponderance of the evidence he will reasonably and probably undergo in the future as a direct result of such injuries, if any; also any loss of earnings, if any, which you may find from a preponderance of the evidence, the plaintiff has sustained as a direct result of such injuries, [fol. 231] if any, from the date of said accident up to now; also any diminished earning capacity, if any, to work and earn money in the future, if any, as a direct result of said injuries.

In connection with this issue, you are also instructed that if you find plaintiff has sustained damage as a direct result of the accident in question on July 12, 1949, then the amount, if any, allowed for any decreased ability to work and earn money in the future, if any, and the amount, if any, allowed for future pain and suffering, if any, should be the present value thereof, and in determining the present value thereof you will make adequate allowance for the earning power of money by discounting such amount, if any, at the highest net rate of interest at which money can be safely and securely invested in this locality; and make the result your answer to this question.

You are instructed that in answering the above issue you cannot allow the plaintiff anything for medical expenses, doctor's bills, nursing or Hospital Bills.

If you have answered any of the issues in this charge to the effect that the plaintiff, Deen, was guilty of negligence and that his negligence was a proximate cause of his injuries, then you will answer the following issue.

Special Issue No. 18:

What sum of money do you find from a preponderance of the evidence, should the recovery you have allowed

herein (if you have allowed any) be reduced by reason of such negligence, if any, of the plaintiff?

Answer in dollars and cents, if any, or none.

Answer: $17,550 (45%)

(S.) John R. Wood, Foreman.

[fol. 232] In determining the amount Plaintiff's recovery should be reduced, if any, you are instructed that if you have found any negligence on his part that was a proximate cause of his injuries and if you have found any negligence on the part of the Defendant that was a proximate cause of plaintiff's injuries, you should reduce said recovery by an amount which bears the same proportion to recovery you would otherwise have allowed that the negligence of Plaintiff bears to the combined negligence of the Plaintiff and the defendant.

SPECIAL ISSUE No. 19:

Do you find from a preponderance of the evidence that the Plaintiff's injuries were not the result of an unavoidable accident?

Answer either "It was not the result of an unavoidable accident or

"It was the result of an unavoidable accident".

You are instructed that an unavoidable accident is one which occurred without any negligence on the part of the Plaintiff, Earl R. Deen, or the Defendant, Gulf, Colorado & Santa Fe Railway Company, Proximately contributing thereto.

Answer: It was not the result of an unavoidable accident.

(S.) John R. Wood, Foreman.

And the Court having received such verdict which was thereupon filed and entered of record in the minutes of the Court, whereupon the Plaintiff filed his motion for judgment and the defendant filed its motion for judgment on the Jury's verdict and for judgment on said verdict [fol. 233] disregarding Issue 1, 2 and 3 therein; and after due notice to all parties the hearing on said motions was set for hearing and such hearing was held before the court on the 26th day of April, 1954, and the court after having

heard said motions the court was of the opinion, and it is so ordered, that Defendant's motion should be and the same is hereby in all things over-ruled, and the court is of the opinion and it is so ordered that the Pllaintiff's motion for judgment upon the verdict of the jury should be, and the same is hereby sustained and to which action of the court the defendant excepted, and by reason of such ruling the court is of the opinion that judgment should be rendered as follows for the Plaintiff.

It Is Therefore Ordered, Adjudged and Decreed by the Court on this the 26th day of April, 1954, that the said Plaintiff, Earl R. Deen, do have and recover from the said Defendant, Gulf, Colorado & Santa Fe Railway Company the sum of $21,450.00, together with interest thereon at the rate of 6% per annum from this date and all costs of suit:

It Is Further Ordered, Adjudged and Decreed by the Court that the Court having heretofore found by agreement of the parties that Plaintiff, Earl R. Deen borrowed or was advanced the sum of $650.00 from the Railroad Retirement Board and that such sum of $650.00 in the event of any collection payment or any settlement under this judgment is to be repaid to said Railroad Retirement Board and that Defendant, Gulf, Colorado & Santa Fe Railway Company is hereby ordered to deduct the sum of $650.00 from the amount or any amount paid hereunder by virtue [fols. 234-236] of this judgment, and is ordered to pay the same to the Railroad Retirement Board. All of which let execution issue to which judgment of the Court and the Defendant then and there in open court excepted.

Entered this 12 day of May, 1954.

A. O. Newman, Judge, 35th Judicial District Court, Brown County, Texas.

Entered April 12, 1954.

[fol. 237] IN THE DISTRICT COURT OF BROWN COUNTY, TEXAS

[Title omitted.]

DEFENDANT'S AMENDED MOTION FOR A NEW TRIAL
Filed May 13, 1954

To the Honorable Judge of said Court:

Now comes Gulf, Colorado and Santa Fe Railway Company, Defendant in the above entitled and numbered cause, and leave of Court having been first sought and obtained, files this, its Amended Motion for a New Trial, in lieu of its original motion now on file in said suit, and moves the court to set aside the verdict and judgment heretofore rendered against it, and to grant a new trial herein upon the following grounds:

1.

The court erred in overruling the special exception contained in Paragraph I of Defendant's Second Amended Original answer directed to Plaintiff First Amended Original Petition.

2.

The Court erred in overruling Defendant's motion for an instructed verdict.

3.

The Court erred in overruling Defendant's motion for judgment on the verdict of the jury and for disregarding Issues Numbers 1, 2 and 3 of the Verdict.

4.

The Court erred in rendering judgment in favor of the Plaintiff for the reason that the evidence in the [fol. 238] cause failed to support the findings of the jury to the effect (a) that Defendant failed to furnish Plaintiff with the proper tools to remove the babbitt from the melting pot at the time and on the occasion in question; (b) that such failure to furnish proper tools was

negligence; and (c) that such negligence was the proximate cause of the injuries sustained by the Plaintiff.

5.

The Court erred in rendering judgment in favor of the Plaintiff for the reason that Plaintiff testified to the effect that with adequate help the babbitt could have been removed safely in a manner that did not require additional tools, and the jury by its findings determined that the Defendant did furnish adequate help to the Plaintiff and that the Plaintiff's negligent failure to obtain adequate help which was available, was a proximate cause of the injury and, hence, there was no breach of any duty on the part of the Defendant; the Defendant not being under the obligation both to furnish adequate help to do the work in safety without additional tools, and also to furnish special tools or appliances in order to do the work in safety without such help.

6.

The court erred in rendering judgment for the Plaintiff for the reason that the Plaintiff's testimony and the verdict of the jury established that the Defendant had furnished reasonably safe means and method for doing the work required, and the Plaintiff negligently failed to use the safe met-od and means furnished by the Defendant, [fol. 239] but elected to proceed to do the work without the help made available by the Defendant, which act and the consequences thereof the Defendant was not under duty to anticipate; and, hence, any failure of the Defendant to furnish special tools and appliances foe doing such work without the use of the help available was not a proximate cause of the injuries sustained by the Plaintiff.

7.

The Court erred in rendering judgment for the Plaintiff and overruling and refusing Defendant's timely motion for judgment on said verdict, disregarding Issues Numbers 1, 2, and 3, for the reason that there was no evidence sufficient to support the jury's findings to Special Issues

Numbers 1, 2, and 3, therefore, the Defendant was entitled to have judgment rendered in *tis* favor.

8.

The Court erred in rendering judgment for the Plaintiff and overruling and refusing Defendant's timely motion for judgment on said verdict, disregarding Issues Numbers 1, 2, and 3, for the reason that the jury by such findings, have determined that the Defendant did furnish adequate help or assistance to the Plaintiff and that the Plaintiff was negligent in failing to obtain such additional help, the findings of the jury to Issue 1, 2, and 3 to the effect that the Defendant was negligent in not furnishing proper tools to remove the babbitt were and are immaterial because an employer is not liable when he has furnished adequate help and the employee voluntarily proceeds to do the work without such assistance.

9.

The Court erred in rendering Judgment for the Plaintiff and overruling and refusing Defendant's timely [fol. 240] motion for judgment on said verdict disregarding Issues Numbers 1, 2, and 3, for the reason that under the jury's findings, as above set out, that the Defendant furnished adequate help to perform said work in safety and that the Plaintiff was negligent in not getting such additional help, the Defendant is entitled to judgment in its favor, irrespective of the findings in answers to Issues 1, 2, and 3, because the Defendant is not under the obligation to both furnish adequate help to do the work in safety and to furnish any special tools or appliances to do the work with safety, and, therefore, Issues 1, 2, and 3 are immaterial, and by said verdict, Defendant has been absolved of all liability under the law.

10.

The court erred in rendering judgment for the Plaintiff and overruling and refusing Defendant's timely motion for judgment on said verdict disregarding Issues Numbers 1, 2, and 3, for the reason that under said jury's verdict, as above set out, the Defendant having furnished adequate

help to do such work in safety and the Plaintiff having negligently failed to avail himself of such help and voluntarily proceeded to perform same without any requirement by the Defendant, without adequate help, Defendant could not have reasonably anticipated that the Plaintiff would perform same without such adequate help or would negligently fail to call same and, therefore, the findings of the jury to Issue 1, 2, and 3 are immaterial.

11.

The court erred in rendering judgment for the Plaintiff and overruling and refusing Defendant's timely motion for judgment on said verdict disregarding Issues Numbers [fol. 241] 1, 2, and 3, for the reason that under the undisputed facts in this case, the Plaintiff himself was in charge of the said work, was thoroughly experienced and knew at least as much about the job as anybody else, had done it several times with perfect safety and without injury when he had adequate help, and under said jury's findings, said help was furnished to him but he negligently failed to call for it or ask for it, and under such circumstances, there was no duty or obligation upon the Defendant to furnish any special tools or appliances and, therefor-, Issue 1, 2, and 3 are immaterial and Defendant is entitled to judgment.

12.

The Court erred in rendering judgment for the Plaintiff and overruling and refusing Defendant's timely motion for judgment on said verdict disregarding Issues Number 1, 2, and 3, for the reason that the finding of the jury in response to Special Issue No. 1 is without support in the evidence.

13.

The court erred in rendering judgment for the Plaintiff and overruling and refusing Defendant's timely motion for judgment on said verdict disregarding Issues Numbers 1, 2, and 3 for the reason that the finding of the jury in answer to Special Issue No. 2 is without support in the evidence.

14.

The court erred in rendering judgment for the Plaintiff and overruling and refusing Defendant's timely motion for judgment on said verdict disregarding Issues Numbers 1, 2, and 3, for the reason that the finding of the jury in response to Special Issue No. 3 is without evidence to support it.

15.

[fol. 242] The court erred in rendering judgment for the Plaintiff and overruling and refusing Defendant's timely motion for judgment on said verdict disregarding Issues Numbers 1, 2, and 3, for the reason that under the undisputed evidence in this case, there was no tool or appliance in existence or known at the time of the alleged accident which the Defendant could have or should have furnished to the Plaintiff to remove said babbitt. The only tools and appliances mentioned in the evidence are some type of clamp which the Plaintiff thought might be manufactured and which he admitted might be dangerous to use, and some system of boring holes and inserting a manufactured eye bolt, as described by the witness, Snow, and neither of said alleged appliances or tools was in existence, nor is there any evidence that same had ever been used or could be used with safety or that they would be safer than turning over said pot with the adequate help furnished to the Plaintiff.

16.

The Court erred in rendering judgment for the Plaintiff and overruling and refusing Defendant's timely motion for judgment on said verdict disregarding Issues Numbers 1, 2, and 3, for the reason that under the law the Defendant is not obligated to furnish the best or newest, or even the safest tools, and as long as it has furnished a proper and safe way to accomplish the work in this case, adequate available help and assistance, it has no duty or obligation to adopt or furnish some new or different tool or appliance.

17.

The court erred in rendering judgment for the Plaintiff and overruling and refusing Defendant's timely motion for

[fol. 243] judgment on said verdict disregarding Issues Numbers 1, 2 and 3, *fro* the reason that the Jury's answer to said issues could be based only on speculation or conjecture, because under the undisputed evidence there was no known tool or any appliance in common use to perform said work; therefore, any conclusion that there was such a tool or that it was negligence not to furnish it, would necessarily be based on speculation as to the safety or suitability or effectiveness of some new and untried tool or appliance.

18.

The court erred in rendering judgment for the Plaintiff and overruling and refusing Defendant's timely motion for judgment on said verdict disregarding Issues Numbers 1, 2, and 3, for the reason that under the evidence in this case and under the Jury's findings as above set out, the Defendant furnished to Plaintiff adequate help and the Plaintiff was negligent in not using same, and it is undisputed that with such adequate help the Plaintiff himself had performed this same operation with perfect safety on at least three, and probably more, prior occasions and under such state of the record, the finding that tools were necessary or that it was negligence not to furnish same, is wholly unsupported by the record.

19.

The Court erred in rendering judgment for the Plaintiff and overruling and refusing Defendant's timely motion for judgment on said verdict disregarding Issues Numbers 1, 2, and 3, for the reason that under the undisputed evidence in this case, there is no evidence that the Plaintiff would have used any such tools or appliances, assuming that same could have been furnished or that there were any in existence that should have been furnished and, therefore, the jury's finding that the failure to furnish [fol. 244] same was a proximate cause (Special Issue No. 3) in the absence of some evidence indicating that the Plaintiff would, or at lease probably would have used same on the occasion in question, wholly unsupported by the evidence.

20.

The court erred in rendering judgment for the Plaintiff and overruling and refusing Defendant's timely motion for judgment on said verdict disregarding Issues Numbers 1, 2, and 3, for the reason that the only tool or appliance mentioned in the evidence in this case are some which thought up after the alleged accident by the Plaintiff and by Snow, neither of which had ever been tried, nor their feasibility or safety determined, and under the law, the Defendant would be guilty of negligence to furnish and require the use by an employee of a new and untested tool or appliance, particularly where, under the undisputed evidence, there was a safe way to do said work with adequate help available with no danger existing.

21.

The Court erred in rendering Judgment for the Plaintiff and overruling and refusing Defendant's timely motion for judgment of said verdict disregarding Issues Numbers 1, 2, and 3, for the reason that under the undisputed evidence, the operation was a simple one, merely turning over a tub or vat or pot which contained some heave babbitt metal. Plaintiff was a thoroughly experienced man in charge of said operation and the one to whom the decision was left as to the way and manner in which said work was done. He had performed said work with safety on [fol. 245] numerous other occasions manually and under the jury's findings as above set out, the help was available to him to do it again in the same way and manner and he was negligent in not asking for additional help, and under such undisputed set of facts and circumstances, as a matter of law it is not negligence to fail to design or furnish special tools or equipment to do the work which could be done with safety in the usual way and manner.

22.

The court erred in rendering judgment for the Plaintiff and overruling and refusing Defendant's timely motion for judgment on said verdict disregarding Issues Numbers 1, 2, and 3, for the reason that under the law there

is no duty or obligation upon the Defendant to furnish several safe ways to do any work and under the undisputed evidence in this case, there was a way to do said work in reasonable safety, to-wit, turning same over manually with adequate help, and under the Jury's findings above set out, said help was available to the Plaintiff and he was negligent in not availing himself thereof and, therefore, under such set of circumstances there was no duty upon the Defendant to furnish or design tools or appliances to do said work in some other fashion.

23.

The Court erred in rendering judgment for the Plaintiff and overruling and refusing Defendant's timely motion for judgment on said verdict disregarding Issues Numbers 1, 2, and 3, for the reason that said Issues 1, 2, and 3 assume that there was a duty or obligation upon the Defendant to furnish the Plaintiff tools so that he could do the work alone with safety, when under the law all the Defendant was obligated to do was to furnish a method or [fol. 246] means by which said work could be done with reasonable safety, and under the undisputed evidence there was such a means, to-wit, doing same manually with adequate help, and under the jury's findings, said adequate help was available and Plaintiff was negligent in not availing himself of such help and, therefore, the jury's findings are wholly unsupported by the evidence and contrary to law.

24.

The court erred in submitting Special Issue No. 1, over Defendant's exceptions thereto contained in Paragraph III (a) of Defendant's exceptions and objections to the Court's charge in this case, reading as follows:

"(a) There is no evidence justifying the submission *fo* the Jury of an issue as to the Defendant's failure to furnish tools, proper or otherwise, in this case".

25.

The court erred in submitting Special Issue No. 1, over Defendant's exceptions thereto contained in Paragraph III

(b) of Defendant's exceptions and objections to the Court's charge in this case, reading as follows:

"(b) Under the undisputed evidence in this case, the only claim that other tools might have been designed is speculative and under the undisputed evidence there were not any tools in existence at or prior to the time that the Plaintiff was injured other than the tools that were used and which were useable, and the defendant is not required by law to furnish every kind of device and appliance that might be conceived by man, but is only required to exercise reasonable care to furnish reasonable tools to do the work."

[fol. 247]

26.

The Court erred in submitting Special Issue No. 1, over Defendant's exceptions thereto contained in Paragraph III (d) of Defendant's exceptions and objections to the Court's Charge in this case, reading as follows:

"(d) The Defendant excepts to said Special Issue No. 1 because the same puts on the Defendant an undue burden of proving proper tools were furnished without the Court saying what tools the Court has in mind; and the jury might answer such issue 'Yes' if the jury, itself, can conceive of some devise or tool that might have been used, and the Court does not limit said issue to the tools or devices which the Plaintiff says might have been devised or furnished and therefore said issue is not confined to the evidence."

27.

The Court erred in submitting Special Issue No. I Over Defendant's exceptions thereto contained in Paragraph III (e) of Defendant's exceptions and objections to the Court's charge in this case, reading as follows:

"(e) The Defendant further objects and excepts to Special Issue No. 1 for the reason that under the facts in this case there was no burden on this Defendant to furnish any particular tool or appliance to remove the babbitt from the pot, which removal was a simple operation and could be accomplished without danger, and was an operation in which no special tool, devise or appliance was necessary; and under the court's phrasing of said Issue No. 1, the jury

is told that the Defendant should have designed some devise or tool, when, as a matter of fact, no tools are necessary, and in any event the Defendant is entitled to have the issue submitted without the court commenting on the uright of the evidence as to whether *additols* were required or not."

[fol. 248] 28.

The Court erred in submitting Special Issue No. 2 over Defendant's exceptions thereto contained in Paragraph IV (a) of Defendant's exceptions and objections to the Court's charge in this case, reading as follows:

"(a) There is no evidence justifying the submission to the Jury of an issue as to the Defendant's failure to furnish tools, proper or otherwise, in this case".

29.

The Court erred in submitting Special Issue No. 2, over Defendant's exceptions thereto contained in Paragraph IV (b) of Defendant's exceptions and objections to the Court's charge in this case, reading as follows:

"(b) Under the undisputed evidence in this case, the only claim that other tools might have been designed is speculative and under the undisputed evidence there were not any tools in existence at or prior to the time that the plaintiff was injured, other than the tools that were used and which were useable, and the defendant is not required by law to furnish every kind of device and appliance that might be conceived by man, but is only required to exercise reasonable care to furnish reasonable tools to do the work."

30.

The Court erred in submitting Special Issue No. 2 over Defendant's exceptions thereto contained in Paragraph IV (d) of Defendant's exceptions and objections to the Court's charge in this case, reading as follows:

"(d) The defendant excepts to said Special Issue No. 2 because the same puts on the defendant an undue burden of prov*id*ing proper tools were furnished without the court saying what tools the court has in mind; and the jury

[fol. 249] might answer such issue 'Yes' if the jury, itself, can conceive of some device or tool that might have been used, and the court does not limit said issue to the tools or devices which the plaintiff says might have been devised or furnished and therefore said issue is not confined to the evidence."

31.

The court erred in submitting Special Issue No. 2 over Defendant's exceptions thereto contained in Paragraph IV (e) of Defendant's exceptions and objections to the court's charge in this case, reading as follows:

"(e) The defendant further objects and excepts to Special Issue No. 2 for the reason that under the facts in this case there was no burden on this defendant to furnish any particular tool or appliance to remove the babbitt from the pot, which removal was a simple operation and could be accomplished without danger, and was an operation in which no special tool, device, or appliance was necessary; and under the court's phrasing of said Issue No. 2, the jury is told that the defendant should have designed some device or tool, when, as a matter of fact, no tools are necessary, and in any event the defendant is entitled to have the issue submitted without the court commenting on the weight of the evidence as to whether additional tools were required or not."

32.

The Court erred in submitting Special Issue No. 3 over Defendant's exceptions thereto contained in Paragraph V of its exceptions and objections to the Court's charge, reading as follows:

[fol. 250] "V. The defendant objects and excepts to Special Issue No. 3 for the reason that under the undisputed evidence in this case any failure to furnish any kind or character of tools was not and could not have been a proximate cause of the plaintiff's injuries, and any affirmative answer by the jury or finding by the jury in the affirmative in answer to said issue would be unsupported by the evidence."

33.

The Court erred in submitting Special Issue No. 17 and the measure of damages in connection therewith over Defendant's objections thereto contained in Paragraph XIII (a) of Defendant's exceptions and objections to the Court's charge, reading as follows:

"(a) The Court's definition or instruction fails to inform the jury that the recovery in this case is not subject to Income Taxes and therefore they may take such absence from burden of taxes into consideration in determining the amount if any is allowed."

34.

The Court erred in submitting Special Issue No. 17 and the measure of damages in connection therewith over Defendant's objections thereto contained in Paragraph XIII (b) of Defendant's exceptions and objections to the court's charge, reading as follows:

"(b) Said issue is further erroneous in that under the undispted evidence the plaintiff has worked for four years since his injury for the defendant, drawing a higher rate of hourly pay than he got at the time he was injured, and under his own testimony, he has worked as steadily as any of the other employees, and under such circumstances the court will have to confine any recovery to the time while he was off from work and cannot by his charge permit a re- [fol. 251] covery which would overlap and include the four years that plaintiff has been working for the defendant, or any part thereof, and drawing his full pay for each and every day; and by the charge the court does not in any way or manner inform the jury they cannot allow double recovery, nor allow the plaintiff damages while he has been working steadily and drawing a higher pay than he drew at the time of the injury; and the defendant requests the court to limit any recovery for loss of time in the past to the period between the date of the injury and the 3rd day of April, 1950, being the date the plaintiff returned to work."

35.

The Court erred in refusing to submit Defendant's Requested Issue No. 5, which, omitting the formal parts, read as follows:

"a. Do you find from a preponderance of the evidence that the Plaintiff Deen was negligent on the case in question in placing his foot where the babbitt could and did strike same?

Answer Yes or No.

Answer ——.

If you have answered the foregoing question "Yes", then answer the following. If you have answered it "No", you need not answer the following.

b. Do you find from a preponderance of the evidence that the negligence, if any, of the plaintiff inquired about in the preceding issue was a proximate cause of his injuries?

Answer Yes or No.

Answer ——."

[fol. 252] 36.

The court erred in failing and refusing to submit Defendant's Requested Issue No. 6, which, omitting the formal parts, read as follows:

"a. Do you find from a preponderance of the evidence that the Plaintiff was negligent in the use of equipment he selected on the occasion when he sustained his alleged injuries?

Answer Yes or No.

Answer ——.

If you have answered the foregoing question "Yes," then answer the following. If you have answered it "no", you need not answer the following.

b. Do you find from a preponderance of the evidence that the negligence, if any, of the Plaintiff inquired about in the preceding issue was the proximate cause of his injuries?

Answer Yes or No.

Answer ——."

37.

The Court erred in failing and refusing to submit Defendant's Requested Issue No. 7, which, omitting the formal parts, read as follows:

"a. Do you find from a preponderance of the evidence that the Plaintiff failed to ask for instruction as to how he should do the work which he was doing at the time he sustained his injury?

Answer Yes or No.

Answer ——.

[fol. 253] If you have answered the foregoing question "Yes", then answer the following. If you have answered it "no", then you need not answer the following.

b. Do you find from a preponderance of the evidence that the failure of Plaintiff to ask for instructions as inquired about in the preceding issue was negligence on his part?

Answer Yes or No.

Answer ——.

If you have answered the foregoing question "yes", then answer the following. If you have answered it "no", then you need not answer the following.

c. Do you find from a preponderance of the evidence that the negligence, if any, on the part of the plaintiff as inquired about in the preceding issue was a proximate cause of his injuries.

Answer Yes or No.

Answer ——.

38.

The court erred in failing and refusing to submit Defendant's Requested Issue No. 8, which omitting the formal parts, read as follows:

"Do you find from a preponderance of the evidence that the work Plaintiff was doing at the time he was injured was simple and that the danger of the injury which he sustained was open and obvious?

Answer Yes or No.

Answer ——."

39.

The court erred in overruling and refusing Defendant's Requested Explanatory Instruction No. 12, which, omitting the formal parts, was as follows:

[fol. 254] "In connection with the issue on damages herein, Defendant requests the court to instruct the jury as follows:

You are instructed herein that the amount which you allow the Plaintiff, if any you do allow, will not be subject to federal or state income taxes, and you may consider such fact in determining the damages."

40.

The Court erred in entering judgment on the jury's verdict for the reason there is an irreconcilable conflict between the jury's findings that it was negligence on the part of the Defendant to fail to furnish tools and the jury's findings that the Defendant furnished adequate help and the Plaintiff was negligent in failing to obtain same, because if the Defendant furnished adequate help to safely do the work, it could not be negligence on the part of the Defendant to fail to furnish tools and appliances; hence, the court erred in entering judgment for the Plaintiff since there was no motion by the Plaintiff to disregard the jury's answers to the issues on adequate help and the Plaintiff's negligence and failure to obtain same.

41.

The court erred in entering judgment for the Plaintiff based on the jury's answer to Issues 1, 2, and 3, for the reason that the jury's answers thereto are against the overwhelming weight and preponderance of the evidence.

42.

The court erred in entering judgment for the Plaintiff in the amount of Twenty-one Thousand Four Hundred Fifty ($21,450.00) Dollars, for the reason that the jury's finding that Plaintiff's negligence only contributed forty-[fol. 255] five percent (45%) to the alleged accident is

against the overwhelming weight and preponderance of the evidence, which indicates that the Plaintiff contributed at least seventy-five percent (75%) to his own injury and, therefore, the court should have reduced same accordingly.

43.

The court erred in entering judgment for the Plaintiff in the amount of Twenty-one Thousand Four Hundred Fifty ($21,450.00) Dollars, for the reason that same is clearly excessive under the undisputed record in this case by at least Eleven Thousand Four Hundred Fifty $11,450.00) Dollars.

44.

The court erred in entering judgment for the Plaintiff herein in the amount of Twenty-one Thousand Four Hundred Fifty ($21,450.00) Dollars, for the reason that under the undisputed evidence the Plaintiff has sustained no costs for medical expenses and will sustain none in the future, his actual out-of-pocket loss for lost wages was approximately Two Thousand Two Hundred Fifty $2,250.00) Dollars, and under the undisputed evidence the Plaintiff has been working steadily for the last four years at a salary higher than the one he was making when he was injured, and any allowance by the jury in excess of Ten Thousand ($10,000.00) Dollars was excessive, and particularly in light of the fact that the jury assessed his total damages at Thirty-nine Thousand ($39,000.00) Dollars, the said verdict is against the over-whelming weight and preponderance of the evidenc-.

45

The Court erred in rendering judgment based upon the jury's finding that Plaintiff's damage was thirty-nine Thousand ($39,000.00) Dollars, for the reason that such finding is clearly excessive and against the overwhelming [fol. 256] weight and preponderance of the evidence, and that such finding of Thirty-nine Thousand ($39,000.00) Dollars was excessive by at least twenty-nine Thousand ($29,000.00) Dollars and the court should require a remititur in this case.

46.

The court erred in rendering judgment based upon the Jury's finding of Thirty-nine Thousand ($39,000.00) Dollars damage to the Plaintiff, for the reason that same is against the overwhelming weight of the evidence and indicates prejudice and passion by the jury.

47.

The court erred in rendering judgment against the Defendant in the amount of Twenty-one Thousand Four Hundred Fifty ($21,450.00) Dollars, for the reason that same is based on the jury's finding of original damages in the amount of Thirty-nine Thousand ($39,000.00) Dollars, which is wholly unsupported by the evidence and, therefore, since that finding is unsupported by the evidence, the court could not enter any judgment for any sum whatsoever against the Defendant.

WHEREFORE, the Defendant, Gulf, Colorado and Santa Fe Railway Company, prays that the verdict and judgment herein be set aside and that it be awarded a new trial.

Woodruff & Holloway, Attorneys at Law, Brownwood, Texas, Crowley, Hudson & Keltner. By Luther Hudson, 1313 Continental Life Building, Fort Worth, Texas, Attorneys for the Defendant, Gulf, Colorado and Santa Fe Railway Company.

Filed May 13, 1954.

[fol. 257] IN THE DISTRICT COURT OF BROWN COUNTY, TEXAS

[Title omitted.]

ORDER OVERRULING AMENDED MOTION FOR NEW TRIAL—MAY 18, 1954

On this the 18th day of May, 1954, came on to be heard the amended motion for a new trial of the Defendant, Gulf Colorado and Santa Fe Railway Company, in the above entitled and numbered cause, and it appearing to the court that the original motion for a new trial was filed herein

on the 12 day of May, 1954 and that the amended motion was filed within the time required by law and with leave of court, and that said amended motion is properly before this court and that the parties have agreed to the submission of said amended motion for a new trial on this date, with the approval of this court, and that all other requisites necessary to the proper consideration of said motion at this time have been complied with, and that said motion is in proper time, proper manner and proper form, and with due notice, but it appearing to the court that said motion should be overruled:

IT IS, ACCORDINGLY CONSIDERED, ORDERED, ADJUDGED AND DECREED, that Defendant's amended motion for a new trial be, and it is hereby overruled, to which action of the court the Defendant, Gulf, Colorado and Santa Fe Railway Company, in open court objected and excepted and gave notic- of appeal to the Court of Civil Appeals at Eastland, Texas.

A. O. Newman, Judge Presiding.

Approved as to form: David J. Morris, Attorney for Plaintiff; Luther Hudson, Attorney for Defendant.

Entered May 18, 1954.

[fol. 258] IN THE DISTRICT COURT OF BROWN COUNTY, TEXAS, 35TH JUDICIAL DISTRICT

[Title omitted.]

SUPERSEDEAS BOND—FILED MAY 26, 1954

WHEREAS, in the above entitled and numbered cause pending in the District Court of Brown County, Texas, at a regular term of said court, to-wit, on the 12th day of May, 1954, the said Earl R. Deen recovered a judgment against the Gulf, Colora[illegible] and Santa Fe Railway Company, Defendant in such cause, in the amount of Twenty-one Thousand Four Hundred Fifty ($21,450.00) Dollars, together with interest thereon at the rate of six percent (6%) per annum from such date, and all costs of suit, from which

judgment the said Gulf, Colorado and Santa Fe Railway Company, the Defendant, desires to take an appeal to the Court of Civil Appeals for the 11th Supreme Judicial District sitting at Eastland, Texas:

Now, THEREFORE, we, Gulf, Colorado and Santa Fe Railway Company, a corporation, as Principal, and T. W. Lain, R. K. Hutchings, as Sureties, acknowledge ourselves bound to pay to the said Earl R. Dean, Appellee, the sum of Twenty-five Thousand ($25,000.00) Dollars, conditioned that such Appellant, Gulf, Colorado and Santa Fe Railway Company, shall prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against it, it shall perform its judgment, sentence or decree, and pay all such damages as said court may award against it.

IN WITNESS WHEREOF, said Principal and said sureties have executed this Supersedeas Bond this 24 day of May, 1954.

Gulf, Colorado and Santa Fe Railway Company, "Principal". By: O. B. Wigley, General Attorney, T. W. Lain, "Surety". R. K. Hutchings, "Surety".

Approved and filed this 26 day of May, 1954.

/S/ Henry Buck, Clerk of the District Court of Brown County, Texas, By Leona Hill, Deputy.

Filed May 26, 1954.

(Seal)

[fols. 259-263] Clerk's Certificate to foregoing paper omitted in printing.

[fols. 264-265] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 265A] IN THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL CIRCUIT

No. 3135

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Appellant

vs.

EARL R. DEEN, Appellee

OPINION—FEBRUARY 4, 1955

APPEALED FROM THE DISTRICT COURT OF BROWN COUNTY, TEXAS

On July 12, 1949, Earl R. Deen had his leg broken by babbitt falling from a melting pot and he sued his employer, the Gulf, Colorado & Santa Fe Railway Company, for damages under the Federal Employers' Liability Act. (See 45 USCA, Sec. 53). Deen had then been employed by said company as a coppersmith in its roundhouse in Brownwood for eleven years. The company kept there a babbitt melting pot which had cracked and was no longer useable. The railway company had ordered a new pot. On the morning of July 12th, Deen's foreman advised him there was an engine in the roundhouse which had to be repaired that day. Deen was working on said engine when the clerk of said company's store department told him the new pot was on the way to the roundhouse from the depot. Deen left the engine, moved the old pot to the floor and was attempting alone to dump the babbitt out of the pot when a blacksmith, Snow, saw Deen and volunteered to help. Snow and Deen tried to dump the pot "away" from them but it was too heavy to tilt the pot forward without more help and they then pulled the pot toward them and the babbitt fell forward from the pot and broke Deen's leg. Deen did not ask for any help. Three times within the preceding three weeks, Deen, with the assistance of sufficient help, had manually removed the babbitt without anyone being injured. There were about sixty other men employed in Deen's department of the railway shop. His employers were not advised that he was then going to do

[fol. 265B] such work, nor how he proposed to do it, but Deen voluntarily attempted to do it alone and then, after Snow volunteered, he proceeded to remove the babbitt with only the assistance of Snow.

Deen alleged it was necessary, if said engine was to be repaired that day, that there be no delay in installing the new melting pot and that it was his duty to get the old pot off the furnace and remove the babbitt; that he moved the pot from the furnace to the floor; that the pot weighed about 250 pounds and the babbitt and pot together weighed about 800 pounds; that to get the babbitt out of the pot it was necessary to raise the pot on its edge so the babbitt would fall out; that the railway company knew, or should have known, that the old pot had to be moved and the babbitt taken out and, therefore, it was its duty to furnish Deen with proper tools with which to take the babbitt out of the old pot, or to furnish *"sufficient help to remove such babbitt without the use of tools"*; that Deen knew the babbitt could not be removed without tools to grasp the pot and give sufficient leverage to turn the pot over, or *"that he have sufficient help to tip the edge of said pot over and turn the same in the direction away from the plaintiff"*; that plaintiff procured the help of one man, Snow, to turn said pot over and dump the babbitt; that they attempted to turn the pot over by raising it on its edge and tilting it *"away from them"* but, because of its weight, they could not do so; *"that because of the lack of sufficient help or sufficient tools,* it then became necessary for the plaintiff and the said Snow to grasp said pot upon its edge and pull same *towards them* in order to turn the same over"; that when they tilted the pot toward them the babbitt fell toward Deen and struck his leg. *"That had the plaintiff had sufficient help, to-wit: at least two other persons, to assist in turning said pot over, the same could have been done by lifting the same and turning it over away from the said plaintiff and the said Snow, but because of the negligence of the defendant in failing to furnish sufficient help or sufficient tools"* Deen was injured. (Emphasis ours). [fol. 265C] Defendant answered, among other things, that Deen decided when and how this should be done and that he acted without instructions as to how it should be done;

that Deen did not ask for additional help nor for instructions; that the method used was decided by Deen alone and, if there was negligence in the amount of help used or the manner in which the work was done, said matters were determined solely by Deen and his injury was the result of his own negligence.

A jury found (1) the railway company failed to furnish Deen with proper tools to remove the babbitt and (2) that such failure was negligence and (3) a proximate cause of Deen's injury; that (4) defendant did not fail to furnish one or more men, in addition to Snow, to assist Deen in removing the babbitt from the melting pot; that (7) the railway company did not fail to give Deen proper supervision; that (10) Deen was negligent in failing to obtain additional help to do the work he was doing when he was injured and that (11) Deen's said negligence was a proximate cause of his injury. The jury found that (13) Deen was not negligent in the manner and method use in doing the work; that (15) the railway company and its supervisory employees should have reasonably anticipated that Deen would perform the work which caused his injuries in the way and manner in which he did; that (16) the sole proximate cause of Deen's injury was not "due to" his acts and conduct; that (17) $39,000.00 would compensate Deen for his injuries but that (18) said amount should be reduced 45%, or $17,550.00, by reason of Deen's negligence. Judgment was rendered on said verdict awarding Deen $21,450.00 and the railway company has appealed.

The principal question presented is whether there was evidence to sustain the finding that the railway company was negligent in failing to furnish Deen with tools to remove the babbitt from the melting pot. Deen was furnished a revolving hoist and chains with hooks which he used to move the melting pot from the furnace to the concrete floor. [fol. 265D] His injury was caused by the falling of the babbitt from the pot while he and Snow were trying to get the babbitt out by tilting the pot "toward" them, instead of "away from" them, after the pot had been moved from the furnace to the floor. Appellant contends it had no duty to furnish more than one reasonably safe way to do the job; that the babbitt could have been removed with

reasonable safety by the use of the additional help available and that the jury's findings and the undisputed evidence so show.

The melting pot was described by Deen as being about nine to ten inches deep, forty inches long and twenty-two inches wide. It was slightly wider at the top than the bottom. It resembled a kitchen sink. The pot weighed about 250 pounds and it and the babbitt therein weighed about 800 pounds. The pot had an outside rim around its top 1½ to 2 inches wide.

Deen's complaint was, in substance, that it was the company's duty to do one of two things, either furnish tools or additional help to remove the babbitt. Deen seems to recognize in his pleadings the correctness of appellants' proposition that the company did not have a duty to furnish more than one reasonably safe way to do the work.

We shall now attempt to determine the correctness of appellant's contention that the verdict and the undisputed evidence show that the babbitt could have been removed with reasonable safety with the additional help available to Deen. If this contention is correct, the railway company had furnished one reasonably safe way to do the job and it had no duty to furnish a second reasonably safe way, that is, to furnish Deen with tools. In other words, if there was no need for tools the railway company had no duty to furnish them. Western Union Telegraph Co. vs. Coker, (Sup. Ct.) 204 SW (2d) 977, 979; Louisville & N. R. Co. vs. Davis, 75 Fed. (2d) 849; August vs. Texas & N. O. R. Co. 265 SW (2d) 148, 153 (RBER); Armstrong vs. Missouri-[fol. 265E] Kansas-Texas R. Co. of Texas, 233 SW (2d) 942, 946 (NNRE); Wolfe vs. Manwood, 162 Fed. (2d) 998, 1000; Pore vs. Southern Ry. Co., 178 Fed. (2d) 349, 351; McGivern vs. Northern Pac. Ry. Co., 132 Fed. (2d) 213, 217; Thomson vs. Pennsylvania R. Co., 88 Fed. (2d) 148, 150; Johnson vs. Pulliam, 161 SW (2d) 589 (RWM).

As heretofore shown, the jury found the railway company did not fail to furnish more men to assist Deen in removing the babbitt; that it did not fail to give Deen proper supervision at the time of his injury; that Deen was negligent in failing to obtain additional help to remove the babbitt and that such negligence was a proximate cause

of his injury. We think said answers, considered in connection with the record, must be construed as a finding that sufficient men were available to help Deen remove the babbitt with safety. If it does not include a finding that the babbitt could have been thus removed with reasonable safety, we need only to further determine whether the record shows that if Deen had used sufficient help the babbitt could have been manually removed with reasonable safety. It is undisputed that several times recently before Deen's injury, he, with sufficient help, had manually removed the babbitt without injury. Deen pleaded that it was the company's duty to either furnish tools or additional help and the jury found that additional help was furnished and Deen was negligent in not using it. It is shown by Deen's testimony that if the babbitt could have been emptied by turning the pot away from, instead of toward, the men doing the work it could have been manually done with safety. The record shows that with sufficient help the babbitt could have been manually removed from the pot with reasonable safety by tilting the pot away from the men doing the work. The testimony of Deen and his witnesses are conclusive on this question. The following testimony of Deen and his witnesses show the situation existing when Deen was injured and requires said conclusion. Mr. Deen testified:

[fol. 265F] "A. Mr. Earl Snow, who was working at a blacksmith job—came over and said, 'Maybe I can give you a lift' or in some way he remarked that maybe he could help me, and I said, 'Well, let-s see if we can turn it over away from us' and we tried to turn it *away from us,* but we couldn't. And I said, 'Well, maybe we can pull it *toward us,* if we can brace ourselves, you can brace there on the work bench, or work table that we have here, and I will brace on the furnace', and so we braced ourselves, tried it and gradually came up with it; but it was very slow because we were over-powered to start with, but we managed to get it up about straight, on its side, and I wouldn't say that I did, but one of us remarked—I think that I was the one that mentioned it to look out that thing sure would mash your toe."

• • • • • • •

"Q. *Could it have been turned away from you if you had had more man power?*

A. *I don't see why it couldn't.*

Q. How many additional men would you say it would take?

A. How many——

Q. *How many additional men to turn that pot by lifting it away from you?*

A. *One good man, anyhow.*"

* * * * * * *

"Q. Now, all right, on this particular occasion, did you request any help in lifting this pot?

A. No, sir."

* * * * * * *

"Q. Well, from the time you first noticed—I am not talking about the time of your last batch, but from the time you first got it cracked until the time you got hurt, it had been some two or three weeks, had it not?

A. Yes, sir.

Q. During that time, you and others had taken it out of there—out of the furnace, on the ground there, and taken the babbitt out, and brazed it, one or more times?

A. Yes, sir.

Q. About three times, wasn't it?

A. Yes, sir."

* * * * * * *

Q. Now, Earl, I will ask you if that pot, babbitt pot, and the removal of it was your job?

A. Yes, sir.

Q. And, were you a full rated man, getting the maximum rate for your job?

A. Yes, sir.

[fol. 265G] Q. In doing the work out there, I will ask if you or any full rated man was expected to know pretty well how to do the job?

A. Yes, sir.

Q. All right. As far as getting that pot out, who was in charge of that?

A. I was.
Q. Did the foreman tell you to take the pot out?
A. No, sir."

. . . . . .

"Q. All right, but any way, as far as this particular job was concerned you were just told by the clerk,—Mr. Bettis, I believe it is?
A. Yes, sir.
Q. That it was—or that the new pot had come in?
A. Yes, sir.
Q. And that they—the Store Department had gone after it in a truck?
A. Yes, sir.
Q. And nobody told you, none of the supervising employees, Williams or Johnson, or anybody else, told you how to do that job, did they?
A. No, sir.
Q. Whose responsibility was it to do the job?
A. Mine.
Q. Who decided it was going to be done at that particular time?
A. I did.
Q. Who decided as to whether you were going to do it by yourself or to go ask for help?
A. I did.
Q. There were men around there that could have been found to help you, weren't there?
A. I suppose they could, but I had asked so many times and they hadn't been."

. . . . . .

Q. All right, next question: 'Well, did you go and ask him for some help? Answer: 'No, sir.' Did you say that?
A. I did.
[fol. 265H] Q. Question: 'There were men working there that you could have had assigned to help you, were there not? And you answered 'Yes, sir?'
A. Yes, sir.
Q. Did you say that?

A. Yes, sir.

Q. Is that true?

A. Yes, sir.

Q. Next question: 'And you did not ask for more help?' Answer: 'Not on that particular job, no sir.' Was that your answer?

A. That's right.

Q. Next question: 'You had not discussed that particular job with the foreman at all?' Answer: 'No, sir.' Did you say that?

A. Yes, sir.

Q. And was that true?

A. Yes, sir.

Q. All right. Then 'There were some men reasonably close the foreman could have assigned to help you?'

A. Yes, sir, but I don't know whether he would or not.

Q. Anyway, you didn't ask him and have him refuse?

A. No, sir.

Q. Now, getting back to getting that pot out, I think you had taken it out about three times before in the past two or three weeks, had you not?

A. Something like that.

Q. You knew how to handle that job, didn't you, Earl?

A. I thought I did.

Q. Was there anyone out there that knew more about it than you did, or who had taken it out more times than you had?

A. No, sir."

* * * * * * *

Q. All right; let's just take them one at a time: The decision as to when to take it out; who made that decision?

A. I did."

* * * * * * *

[fol. 265I] "Q. All right, now, Earl, if I misquote you, please tell me; as to getting that babbitt, so far as that is concerned, you might have been able to break it with a sledge hammer or some other way, but *you figured that the safest way was to turn it over?*

A. *That's right.*

Q. All right; whose decision was that?

A. I don't remember, but as well as I remember, we both talked about it.

Q. Who talked about it?

A. Me and Earl Snow.

Q. Well, Earl, who was in charge of removing that pot and babbitt, you or Earl Snow?

A. I was.

Q. Well, anyway, *you agree that is the best way to do it, dodn't you, Earl?*

A. *Yes, sir.*

Q. All right. Now, incidentally, after you got that old babbitt pot out, the furnace was empty where you could put the new one in it, wasn't it?

A. Yes, sir.

Q. There wasn't any hurry about getting the babbitt out of the old pot right then, was there?

A. Nothing more than it had to come out, if the engine was got out that day."

• • • • • • •

"Q. Are you telling this jury right now—if you don't know, tell me you don't know; but are you telling this jury right now there was not plenty of babbit out there besides what was in that pot on that day?

A. I don't know that there was.

Q. Well, you don't know whether there was or wasn't, Earl, is this just about the truth, you were going to have to do it sooner or later, and you were there waiting on the truck, and you just decided to do it then?

A. That's right.

Q. All right, now, whose decision was that?

A. Mine.

Q. The foreman did not tell you to do that at that time?

A. No."

• • • • • • •

[fol. 265J] "Q. So, turning it over is what you had done on the other occasions to get the babbit out?

A. That's right.

Q. All right. And the pot weighed the same, didn't it?

A. Yes, sir.

Q. And the—was there ever that much babbitt in it before?

A. Yes, sir.

Q. All right. How many men did it take to turn it over the other times?

A. Four or five, or five or six ahold of it; I have had as many as six ahold of it.

Q. Did anybody know that any better than Earl Deen?

A. No, sir; I don't suppose they did.

Q. And on the other occasions, during the past two or three weeks, when you changed it out, you had as many as five or six men helping you?

A. Yes, sir.

Q. All right. Nobody refused to let them help you, did they, Mr. Deen?

A. No, sir; I caught them when they was right there available, and I asked them and they helped."

* * * * * * *

"Q. There wasn't anything wrong with that operation out there that day, outside of your foot being in the way when that babbitt fell out?

A. So far as I know.

Q. There wasn't?

A. That's right."

* * * * * * *

"Q. Now, Mr. Deen, with reference to lifting this pot the way that you did, you did demonstrate to the jury the way you and Mr. Snow *got in front* of it and braced yourself with one hand and *pulled it toward you?*

A. Yes, sir.

Q. Was there any other way to lift that pot and to turn it that way, that is, for two men to do it other than that way?

A. *Two men was overloaded* in doing that and we had tried before to turn it *away from us* for safety measures.

Q. And is that why you had to get in front of it?

A. That's true with only two of us were able to pull more than we was able to lift and push."

• • • • • • •

[fol. 265K] "Q. Question 77: But *you knew that you would get help sooner or later to get it down.* And you answered: 'Yes, sir.' Did you make that answer?

A. Yes, sir.

Q. Was that true?

A. Yes, sir.

Q. *You did know that you would get help sooner or later?*

A. Yes, sir.

Q. In other words, you knew that they were not going to let this furnace be shut down indefinitely waiting to get the new pot installed? Answer: 'They never have, but sometimes it looked like we were going to have to go to town and get help' did you answer that?

A. Yes, sir.

Q. Next question: What I am getting at is this: If you had not done it at that particular hour or minute, and let the pot go up to the warehouse, you would still have had to go through the same procedure, that is, you would still have had to take the old pot out and put the new one in. and you answered: 'Yes, sir' did you make that answer?

A. Yes, sir.

Q. Did you say that?

A. I sure did.

Q. In other words, it would have meant a few minutes, or the difference would have been the delay in getting help; is that right?

A. Yes, sir."

• • • • • • •

"Q. When I asked you about designing something, all that you could think of was the clamps and that would be dangerous, wasn't that your testimony?

A. Yes, sir.

Q. And yesterday you testified that you had moved that pot several times?

A. Yes, sir.

Q. And that you knew more about moving that pot than anybody in the shop; now, do you wish to change that?

A. I don't think I said I knew more about it than anybody in the shop.

Q. I believe you said you knew as much about it as anybody in the shop?

A. Well, let it go at that."

• • • • • • •

[fol. 265L] "Q. Now, Mr. Deen, if you had had another man or two men more to help in lifting that pot, would your foot likely to have been in the position it was when injured?

A. If I had had enough help, I would have turned it away from me."

Plaintiff's witness Snow testified:

"Q. Now, with reference to trying to move that pot and trying to empty the babbitt from it *away from you*, could three men have done that job?

A. I suppose they could have, maybe.

Q. Could four men have done it?

A. Well, that might be possible, but I don't know whether four men could get to it or not, maybe they could have and maybe they couldn't.

Q. Could three men have done the job with more ease than two men?

A. Yes, sir; I suppose three men would have been better on the job.

Q. *Could three men have turned it over away from you so the babbitt could fall out?*

A. I think so."

• • • • • • •

"Q. All right. Now, one more question: if you or he had thought it was necessary, could you have gone to the foreman and asked for some more help there?

A. Yes, sir.

Q. Were there men available in that same general area—I don't mean men within ten feet—but men in that general area available to be assigned, or could have been assigned to help you?

A. Yes, sir.

Q. All right. And all it would have caused would have been a delay? Delay getting the job done, is that right?

A. Yes, sir."

. . . . . .

"Q. Now, Mr. Snow, if you had a third man, you would have been behind the pot, would you not?

A. I, myself?

Q. Yes, sir. In other words, if you had had a third man you would not have all three been in front of it, would you, Mr. Snow?

A. No, sir; I wouldn't think so.

Q. Because with a third man, you could have moved it over *from you*, and dumped the babbitt out, could you not?

A. Yes, sir; I think so."

. . . . . .

[fol. 265M] Plaintiff's witness Anderson testified:

"Q. And you know, do you not, Mr. Anderson, that Mr. Deen, in the preceding couple of weeks, had taken that pot out two or three times to braze it; you know that, don't you?

A. Yes, sir.

Q. And put it back?

A. Yes, sir.

Q. And you know, do you not, that he did it with the same equipment that was out there and used on July 12, 1949, don't you?

A. Yes, sir.

Q. All right. And he had gone through exactly the same operation that he had gone through on these other occasions?

A. I reckon.

Q. All right. And you also know that nobody got hurt doing it, don't you?

A. Yes, sir." (Emphasis ours).

We conclude that the verdict and the undisputed evidence show that with the use of the additional help available the pot could have been tilted away from, instead

of toward, the men doing the work and the babbitt thus removed with reasonable safety. The testimony of Deen and his witnesses is to that effect. It is undisputed that the babbitt had been thus safely removed three times in the two or three weeks preceeding Deen's injury. Deen alleged it was defendant's duty to either furnish tools or sufficient help. His case was submitted to the jury on that theory. Deen thus assumed that if sufficient help had been furnished the babbitt could have been manually removed with safety. Sufficient help was available. (See Western Union Telegraph Co. vs. Coker (Sup. Ct) 204 SW (2d) 977, 979.) Under Deen's pleadings and the law, defendant was not required to do both. With sufficient help the babbitt could have been dumped manually with reasonable safety, therefore, there was no need, hence no duty, to also furnish tools. Furthermore, there is no evidence that the additional tools suggested by Deen and Snow were in use, safe or approved. They had not thought of them [fol. 265N] before the accident. Deen testified that the clamps suggested would have been dangerous. They testified that the only way the babbitt could have been safely removed was either with their suggested appliances or manually, with adequate help. Deen testified the safest way was to tilt the pot and let the babbitt fall out. Deen and his witnesses agree that with sufficient help the pot could be tilted away from the men doing the work and the babbitt removed with safety. We sustain appellent's contention that the evidence does not support the finding that defendant was negligent in failing to furnish tools. The defendant was not negligent if it provided the necessary help and Deen voluntarily proceeded to do the work without using it. There were about 60 men working in his department. Deen started to do the work alone, without seeking any assistance and without instructions to do the job then or without help. Snow volunteered to, and did help. Deen had done the same job three times before, in the same way; on those occasions he asked for and obtained adequate help and no injury was suffered. Western Union Telegraph Co. vs. Coker (Sup. Ct.) 204 SW (2d) 977, 979. Deen alleged appellant's duty was to either furnish tools or sufficient help. He was required to prove that defend-

ant did neither. There being a reasonably safe way to dump the babbitt without tools, appellant had no duty to furnish them for that purpose. Judgment should have been rendered for appellant notwithstanding the finding that appellant was guilty of negligence in failing to furnish tools. This decision renders unnecessary a consideration of the other points presented by appellant.

The exceptions stated in R.C.F. 434 are not applicable to this record and we are required to render the judgment the distinguished trial court should have rendered. R.C.F. 434; London Terrace vs. McAlister (Sup. Ct.) 180 SW (2d) 619; Yarbrough vs. Becher (Sup. Ct.) 174 SW (2d) 47; 150 A.L.R. 1369; Lone Star Gas Co. vs. Kelly, 166 SW (2d) 191.

The judgment is reversed and judgment rendered for appellant.

Clyde Grisson, Chief Justice.

February 4, 1955.

[fols. 266-267] In the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas

[Title omitted]

Order Extending Time to File Briefs—June 25, 1954

This day came on to be heard the agreed motion for extension of time to file briefs and the same, having been duly considered, is hereby granted.

In the Court of Civil Appeals of Texas

No. 3135

Gulf, Colorado & Santa Fe Railway Co.

vs.

Earl R. Deen

Judgement—Feb. 4, 1955

This cause came on to be heard on the transcript of the record and, the same being inspected, it is the opinion of

the Court that there was error in the judgment. It is therefore ordered, adjudged and *decreed that the judgment of the trial court be and the same is hereby reversed* and *judgment rendered for Appellant*, in accordance with the opinion of the Court. It is further ordered that all costs incurred by reason of this appeal be, and the same are hereby taxed against Appellee, Earl R. Deen, for which let execution issue, and that this decision be certified below for observance.

[fol. 268] IN THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT EASTLAND

[Title omitted]

MOTION FOR REHEARING—FILED FEB. 19, 1955

Now comes Earl R. Deen, Appellee in the above styled and numbered cause and files this his Motion for Rehearing and as grounds therefor represents as follows:

1.

The Court erred in holding the evidence was not sufficient to support the verdict of the jury and the judgment of the trial court.

2.

The Court erred in holding the evidence was not sufficient to support the jury verdict that the appellee was not furnished proper tools to do his work, that such failure was negligence and was the proximate cause of the injury sustained by appellee.

[fol. 269] 3.

The Court erred in construing plaintiff's pleadings of acts of negligence against the plaintiff and not in favor of the verdict of the jury and the judgment of the trial court. Plaintiff pled failure to furnish adequate help and failure to furnish proper tools both in the alternative and as concurrent acts of negligence producing the plaintiff's injuries. The case was tried, without any objection by the defendant

as if solely concurrent acts of negligence had been pled and submitted to the jury on this basis. It is therefore the duty of this court to resolve any ambiguity in the pleadings in favor of the verdict of the jury and the judgment of the trial court.

4.

The verdict of the jury in answer to Special Issue No. 10 that the plaintiff was negligent in failing to obtain additional help to do the work is in irreconcilable conflict with the jury finding to Special Issue No. 13 that the plaintiff was not negligent in the manner and method used in doing the work and Special Issue No. 16 that plaintiff's injuries were not due solely to his own acts and conduct (Tr. 18).

5.

The Court of Civil Appeals has erred in substituting its findings for that of the jury on issues of fact particularly in view of the emphasis the Honorable Supreme Court of the United States has placed upon the right of trial by jury under the Federal Employers Liability Act.

6.

It is for the jury and not for the Court to say whether the railway company furnished Deen a safe way to do [fol. 270] his work and when the jury finds that the injuries Deen suffered was not due to an unavoidable accident, that Deen was not negligent in the manner and method used in doing his work and that plaintiff's injuries were not solely due to his own acts and conducts the Court takes from him his right of trial by jury when the Court deprives these findings of all force by finding itself in effect that Deen's injuries was solely due to his own negligence in not availing himself of a safe way to do his work.

Argument

Appellant respectfully suggests that the Honorable Court of Appeals has decided that the jury has not returned a fair verdict in this case and has sought to find a way to do what the Court considers justice between the parties.

It is the duty of the Court to indulge every presumption in favor of the jury's verdict and the judgment of the trial court. This is particularly true in Federal Employers Liability cases where the Supreme Court of the United States has emphasized in many recent decisions that Congress has selected the jury as the fact finding agency in this type of case and that it is not for the Courts to substitute what they consider more reasonable points of view for the verdicts of the juries.

Bailey v Central Vermont R. R. Co., 319 U. S. 350, 63 S Ct 1062, 87 L Ed 1444

"That method of determining the liability of carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern system of Workmens' Compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these Workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

We ask the Court to reconsider Clyde Wilkerson v. Wilson McCarthy et al 93 L Ed 497, 336 U S 53 and Va. Ry Co. v. Viars 193 F (2) 547.

[fol. 271] Consider these words in the latter case:

"If, however, plaintiff adopted a dangerous way of doing the work, when a safe one was open to him, this amounted to nothing more than assumption of risk or contributory negligence, neither of which excuses defendant's negligence or bars recovery under the Federal Employers Liability Act. Tiller v. Atlantic Coast Line Ry. Co., 318 U. S. 5454, 63 S. Ct. 444, 87 L Ed 610, Wilkerson v. McCarthy 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed 497."

It is true plaintiff pled failure to furnish adequate help and failure to furnish proper tools in the alternative in some parts of his pleadings. But the plaintiff also pled:

"That the injuries herein set forth resulting to the plaintiff were the direct and proximate result, jointly

and severally, of the negligent acts of the defendant in the following respects:

• • • • • • •

c. That the Defendant was negligent in not furnishing Plaintiff with proper tools, as herein described, to remove said babbitt.

d. That Defendant was negligent in not furnishing at least two additional men to assist Plaintiff in removing the babbitt from said pot." (Tr 6)

The case was tried and submitted to the jury on the above acts as being concurrent acts of negligence. After verdict, isn't it the duty of the Honorable Court of Civil Appeals to construe the pleadings in favor of the verdict of the jury and the judgment of the trial court? 33 Tex Jur Sec 132, p 636.

The evidence certainly raised a fact issue as to whether there was sufficient help available to do the work. We ask the Court to consider the following: Deen's helper was on vacation (S F 7). He was told by the foreman that we got to have that engine today (S F 7). The foreman's clerk told him in the presence of the foreman that if he had the old pot out of the way that he could have help from the men that delivered the new one (S F 8). Doesn't this indicate that there were not 60 men available in the shop to do the work, despite some vague general admissions [fol. 272] made by Deen. We submit the Court can take judicial notice of union rules that forbids a man performing other than his particular duties. Deen testified he hurried to try to take advantage of getting a little help (SF8). Why should he do this if 60 men were available? Two or three times before he had asked for help. The foreman told him, "Earl, we will have to do the best we can." (SF18) Deen said he did not keep on asking for help (SF18). Surely the law does not require this. Here is one of Deen's admissions which we think are construed too strictly against him. "I suppose men were available to help but I had asked so many times and they hadn't been (SF 66). Men were available but I don't know if foremen would assign them (SF69). When he did get

help on previous occasions I caught them when they were right there available (SF 75). Doesn't this indicate that there was some difficulty about getting help? The foreman knew I was shorthanded (SF 85). I didn't know where I could get help if I didn't have it ready when the men arrived (SF 101). We were short-handed on labor and working over time (SF 132). Even after the babbitt fell on Deen, Snow had to shove it off of him without help (SF 110).

Even in connection with the general admissions made by Deen there was certainly an issue of fact for the jury as to whether the railway company furnished adequate help. We do not believe in view of the above evidence the Court would be justified in finding as a matter of law that Deen was negligent in failing to avail himself of adequate help. This and other evidence in the record certainly raised the issues requested by the defendant railway company as to whether plaintiff's injuries were due solely to his own acts and conduct and whether plaintiff was negligent in the manner and method of doing the work. How can a court render judgment against Deen on the jury's finding that he was negligent in failing to obtain additional help and ignore the jury's findings that he was not negligent in the manner and method used in doing the work and that his injuries were not solely due to his own [fol. 273] acts and conduct and was not an unavoidable accident? Deen's attempt to do the work alone and later with the help of Snow was certainly his method of doing the work. On the above evidence along the jury was justified in finding that he was negligent or not negligent in this method. Surely there is an irreconcilable conflict in the jury's finding when they say Deen was negligent in not using available help but was not negligent in his manner and method of doing the work.

With respect to proper tools, if Deen's evidence is construed favorably to the jury verdict, we believe the Court should find not that the tools that Deen and Snow proposed were dangerous but would be dangerous if not properly secured (SF 106). The reasonableness of the tools they proposed, plus evidence that if more men were there the babbitt might have fallen on two of them plus the

contention of the railroad that the babbitt would have fallen out any way, if more men were there, even if the whole shop was there plus the availability of the hoist that could not grasp the pot certainly raised an issue of fact on proper tools. See Galveston H & S A Ry Co. v. Brewer 4 SW (2) 320.

We ask the Honorable Court of Appeals not to close the door on this plaintiff's claim even though because of innate honesty and lack of intelligence he made some general admissions that a more wily and dishonest person would not have been led into.

Wherefore, Appellee prays that the Honorable Court of Civil Appeals set aside its judgment reversing and rendering the judgment of the trial court and affirm the judgment of the trial court and if this cannot be done, in the alternative Appellee prays that this case be reversed and remanded for another trial and Appellee prays for such other and further relief, general and special, at law and in equity to which he may be justly entitled.

[fols. 274-279] David C. McCord, Robert Lee Guthrie, 519 Mercantile Bank Bldg., Dallas Texas, Attorneys for Appellee

Certificate of Service (omitted in printing).

[fol. 280] IN THE COURT OF CIVIL APPEALS OF TEXAS

ORDER OVERRULING MOTION FOR REHEARING—
February 25, 1955

[Title omitted]

This day came on to be heard *Appellee's motion for rehearing and the same, having been duly considered, is hereby overruled.*

[fol. 281] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 282] IN THE SUPREME COURT OF THE STATE OF TEXAS

EARL R. DEEN, Petitioner

vs.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Respondent

APPLICATION FOR WRIT OF ERROR—Filed March 28, 1955

To the Honorable Supreme Court of Texas:

Statement of Case

This is a suit for damages under the Federal Employers' Liability Act (45 USCA Sec 53). On findings of a jury the trial court rendered judgment in favor of the plaintiff for $21,450.00 with interest and costs. The Honorable Court of Civil Appeals has reversed the judgment of the trial court and has rendered judgment that the plaintiff recover nothing. Deen was injured by his leg's being struck by solidified babbitt which fell from a steel pot that was in the process of being overturned by Deen and a fellow employee, both of whom were acting in the scope of their employment. The Honorable Court of Civil Appeals held that the railroad was under a duty to furnish sufficient help or proper tools to do the job safely but were under no duty to do both. The case was tried and submitted to the jury on the theory that the failure to furnish sufficient help and proper tools to do the job safely, independently and jointly, were acts of negligence that proximately caused the plaintiff's injuries. To render judgment against the Petitioner, the Court of Civil Appeals had to ignore the jury findings that the railway company failed [fol. 283] to furnish Deen, the Petitioner, proper tools to do the job and that such failure was a proximate cause of his injuries and had to construe the jury's findings that the Petitioner, Deen, was negligent in failing to obtain additional help to do the job, and said negligence was a proximate cause of his injuries, into a finding that adequate help furnished a safe way to do the job and had to ignore the jury's findings that Deen was not negligent in

the manner and method used in doing the work and that the sole proximate cause of Deen's injury was not due to his acts and conduct. The Honorable Court of Civil Appeals in upholding all findings of the jury favorable to the railroad company and in disregarding all jury findings favorable to Deen has deprived Deen of his right of trial by jury.

Statement of Jurisdiction

The Supreme Court has jurisdiction of this suit under Subdivision 6 of Article 1728 of the Statutes.

Points of Error

First Point. The Court of Civil Appeals erred in holding that as a matter of law and under Petitioner's pleadings that the railroad company was under no duty both to furnish proper tools and additional help to Deen to do the job safely and that the case was submitted to the jury on the theory that Petitioner had the burden to establish both acts of negligence.

Second Point. The Court of Civil Appeals erred in holding that the jury's findings, that Deen was negligent in not using additional help and that such negligence was a proximate cause of his injuries, and the undisputed evidence established that with additional help Deen could have done his job with reasonable safety, despite the jury's [fol. 284] finding that the railway company failed to furnish Deen proper tools to do the job and such failure was a proximate cause of his injuries and despite the jury's finding that Deen was not negligent in the manner and method used in doing the work and despite the jury's finding that the sole proximate cause of Deen's injury was not due to his acts and conduct.

Third Point. The Court of Civil Appeals erred in failing to indulge every presumtion in favor of the verdict of the jury and the judgment of the trial court and in construing Petitioner's evidence as establishing that the only way the babbitt could have been safely removed was with the appliances or manually when Petitioner's evidence, construed most favorably to him and in support of the verdict of the jury and the judgment of the trial court

established that both sufficient help and proper tools were necessary to do the job safely.

Fourth Point. The Court of Civil Appeals erred in holding the Petitioner had to prove that the railway company furnished neither sufficient help nor proper tools to do the work in order to recover.

Fifth Point. The Court erred in holding in effect that the jury's finding that Deen's negligence in failing to use available help amounted to a finding that with additional help he could do the job safely and that the jury's finding that the railway company was negligent in not furnishing him proper tools was immaterial because the railway company owed no duty to furnish Deen two safe ways to do the job since the proper construction of the jury verdict is that both sufficient help and proper tools were necessary to do the job safely.

Sixth Point. The finding by the Court of Civil Appeals that Deen could have done his job safely with additional [fol. 285] help amounted to the Court's finding a disputed issue of fact against the verdict of the jury and the judgment of the trial court.

Seventh Point. Where a jury verdict established that an employee was negligent in failing to use additional help to do a job but also established that the railway company was negligent in failing to furnish him proper tools to do the job, the proper construction of the jury verdict is that the failure of the employee to use additional help amounted to a finding of contributory negligence on the part of the employee which under the Federal Employers Liability Act could be used as a basis to reduce the amount of the Petitioner's recovery, not to defeat it entirely, and the Court of Civil Appeals erred in holding that the employee could not recover anything for his injuries where he failed to avail himself of additional help.

Statement Under the Foregoing Points

Petitioner's complaint is that the Court of Civil Appeals has deprived him of the jury verdict and the judgment of the trial court in his favor and all of the foregoing points may be discussed together. Petitioner pled in the trial court, among other things,

"That the injuries herein set forth resulting to the plaintiff were the direct and proximate result, jointly and severally, of the negligent acts of the defendant in the following respects:

* * * * * * *

c. That the Defendant was negligent in not furnishing Plaintiff with proper tools, as herein described, to remove said babbitt.

d. That Defendant was negligent in not furnishing at least two additional men to assist Plaintiff in removing the babbitt from said pot." (Tr 6)

If there was any ambiguity or inconsistency in the man-
[fol. 286] ner in which Petitioner pled acts of negligence on the part of the Respondent such was not attacked by special exception on the part of the Respondent. The case was tried and submitted to the jury on the theory that insufficient help and the failure to furnish proper tools singly and collectively caused the Petitioner's injury. The judgment of the trial court in favor of the Petitioner was rendered on that basis. It is the Court of Appeals that has injected into the case that the case was tried on the theory that either insufficient help or improper tools caused the Petitioner's injury and that Plaintiff had to establish both acts of negligence in order to be entitled to a judgment.

Not only Petitioner's pleadings but also the evidence fully supported the jury's finding that the railway company was negligent in failing to furnish the Petitioner proper tools. The Petitioner, Deen, worked as a coppersmith in the shops of the Santa Fe Railway at Brownwood (S. F. 4). He was injured in the course of his employment on July 12, 1949 (S. F. 4). On that day a locomotive was in the shops for repair (S. F. 6). The assistant foreman, Mr. Williams told him, "I have got to have this engine today." (S. F. 7). Babbitt, an alloy of antimony, copper and tin, was necessary for these repairs (S. F. 10). The babbitt available was in a cracked pot on the furnace that leaked so badly the molten metal would put out the fire underneath (S. F. 10). Shortly after the assistant

foreman, Williams, told Deen the locomotive had to be out that day, W. J. Bettis, clerk to the general foreman, Johnson, told Deen in the Presence of Johnson that his new babbittt pot had arrived at the freight depot, that men from the store department had gone for it and if he had the old one off the furnace the men on arrival could assist him with the new one (S. F. 8, 96). The old pot weighed [fol. 287] 250 pounds and contained solidified babbitt weighing 650 to 700 pounds (S. F. 14), Deen attempted to get the old pot off the furnace alone and to get the babbitt out of the old pot so that he would have everything ready for the new pot and be ready to do his part in melting the babbitt for use as soon as possible on the engine (S. F. 9, 65). A hoist on a pole affixed to the concrete floor was right beside the furnace for lifting heavy objects (S. F. 8). The 250 pound steel pot, about a yard long, ⅔ of a yard wide and ⅓ of a yard deep (S. F. 12) containing 650 to 700 pounds of babbitt, a total weight of almost ½ a ton, fitted so snugly in the furnace that it was necessary to pry its 1½ to 2 inch rim (S. F. 15) off the brick furnace a height of about an inch (S. F. 9) so as to allow the arms of the crane to grip it and lift it from the furnace (S. F. 9). After the furnace with its babbitt was dropped on the concrete floor there was no way for the hoist to grip it and overturn it so as to empty out the babbitt. Deen testified the pot should have been equipped with clamping devices so that it could be gripped by the arms of the crane and over-turned so as to empty out the babbitt (S. F. 88). By virtue of his training and experience in handling the pot he was an expert. Respondent, on page 22 of its brief filed in the Court of Civil Appeals, states Deen had done this particular job many times and "knew more about it than anyone." Earl Snow, a fellow employee and acting blacksmith testified "I" bolts could be fixed in the pot to fasten the hoist to and that he could have made such attachments in the blacksmith shop (S. F. 116). Deen said with the clamps on the pot, the pot could be gripped by the hoist and overturned with one finger (S. F. 88). Since the pot with its babbitt contents could not be gripped and overturned by the hoist Deen and a fellow

employee, Snow, attempted to overturn the pot manually and in the process the babbitt sluffed out of the pot, fell on Deen's leg and injured him for life (S. F. 44). The [fol. 288] railway company offered no evidence at all. The jury found (1) the railway company failed to furnish Deen with proper tools to remove the babbitt. (2) that such failure was negligence and (3) was a proximate cause of Deen's injury (Tr 60-67).

On the fact issues as to whether sufficient help was available to do the job safely in addition to the pleading of this issue by the Petitioner, the Respondent pled:

> "* * * * that the plaintiff did not ask for additional help * * * * * and that if there was any negligence in the method used * * * * * * it was the negligence and proximately contributed to his alleged injuries."

That is a plea of contributory negligence.

The evidence on the failure to furnish sufficient help in addition to that cited by the Court of Civil Appeals was as follows: Deen's helper was on vacation (S. F. 7). The foreman's clerk told him in the presence of the foreman that if he had the old pot out of the way he could have help from the men that delivered the new one (S. F. 8). There is no evidence that the clerk, the foreman or assistant foreman told him that he could get help to get the old pot out of the way of the new one. Deen testified he hurried to try to take advantage of getting a little help (S. F. 8). Two or three times before he had asked for help. The foreman told him, "Earl, we will have to do the best we can." (S. F. 18). Deen said he did not keep on asking for help (S. F. 18) Deen said: "I suppose men were available to help but I had asked so many times and they hadn't been." (S. F. 66). Men were available but I don't know if the foreman would assign them (S. F. 69). Deen said when he did get help on previous occasions he caught them when they were right there available (S. F. 75). The foreman knew I was shorthanded (S. F. 85). I didn't know where I could get help if I didn't have the

[fol. 289] pot ready when the men arrived (S. F. 101). We were shorthanded on labor and working over time (S. F. 132). Even after the babbitt fell on Deen, Snow had to shove it off of him without help (S. F. 110).

On these facts and other facts cited in the opinion of the Court of Civil Appeals the jury found among other things:

(1) That the railroad did not fail to furnish one or more additional men other than Snow to assist plaintiff in removing the babbitt from the melting pot;

(2) That Deen was negligent in failing to obtain additional help and this was a proximate cause of his injuries;

(3) That Deen was not negligent in the manner and method that he used in doing the work;

(4) That the railway company could reasonably anticipate that Deen would do the job in the way and manner that he did;

(5) That the sole proximate cause of plaintiff's injuries was not due to his own acts and conduct;

(6) That plaintiff's own negligence should reduce the recovery $17,550 or 45% (Tr 60-67).

LIST OF AUTHORITIES

	Original
Bailey v. Central Vermont R. R. Co. 319 U. S. 350, 63 S. Ct., 1062, 87 L. Ed. 1444	10
Galveston, H & S A Fy. Co. v. Brewer (Court of Civil Appeals Galveston writ of error refused) 45 W (2) 320	13
M K T R R Co. v. Webb (Court of Civil Appeals Waco, writ refused (n.r.e.) 229 S. W. (2) 204, 208	19
Pullman Palace Car Company v. Nelson (Court of Civil Appeals Galveston) 54 S. W. 624	12
Swann v. T & P Ry Co. (Court of Civil Appeals Texarkana) 200 S. W. 1131	13
[fol. 290]	
Tennant v. Peoria & P U R Company 321 U. S. 29, 88 L. Ed. 529, 64 S. Ct. 409	10-11
Texas & P Ry Co. v. Riley (Court of Civil Appeals Texarkana) 183 S. W. (2) 991, 994, writ of error refused, certiorari denied 65 S. Ct. 1414, 325 U. S. 873, 89 L. Ed. 891	12-13
Va Ry Co v. Viars (United States Court of Appeals, 4th Circuit) 193 F (2) 547	20
Clyde Wilkerson v. Wilson McCarthy and Henry Swann, as Trustees of Denver & Rio Grande Western R Co. 93 L. Ed. 497, 336 U. S. 53	19-20

Argument

In this case the jury answered certain issues in favor of the Petitioner, Deen, and certain issues in favor of the Respondent, the railway company. The trial court gave effect to all of the answers of the jury rendering the only judgment that could be rendered giving effect to all the answers. The Court of Civil Appeals set aside the judg-

ment of the trial court and rendered judgment in favor of the railway company. To do this the Court of Civil Appeals had to disregard all answers of the jury favorable to Deen and to give effect only to those jury answers that were favorable to the railway company. A jury trial amounts to nothing if a court accepts such answers of the jury that conforms to the court's point of view and disregards all answers that do not conform to the court's point of view.

The Supreme Court of the United States have emphasized that the right of trial by jury under the Federal Employers Liability Act shall remain inviolate and in numerous cases since the far-reaching amendment to the Federal Employers Liability Act enacted in 1939 in reversing United States Courts of Appeals and the Supreme Courts of many states have made it clear that they will not permit the courts to [fol. 291] substitute their own conceptions of what is reasonable for that of the jury.

Bailey v. Central Vermont R R Co.
319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444

"That method of determining the liability of carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern system of workmens' compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

Tennant v. Peoria & P U R Company
321 U. S. 29, 88 L. Ed. 529, 64 S. Ct. 409

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the factfinding body. It weighs the contradictory evidence and inferences, judges the credibility of witness, receives expert instruction and draws the ulti-

mate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

The jury said the railway company did not furnish Deen proper tools to do his work, that such failure was negligence and was a proximate cause of his injuries. This is the only act of negligence the jury found against the railway company. The trial court accepted the findings of the jury, along with other findings and rendered the only judgment that could have been rendered giving effect to all of the findings of the jury. The Court of Civil Appeals says the jury and the trial court were in error in finding that the [fol. 292] railway company was negligent in not furnishing proper tools to Deen to do his job. In the opinion of the Petitioner the Court of Civil Appeals did not indulge every presumption and draw every inference in favor of the verdict of the jury and the judgment of the trial court but searched the record to discover ways of construing Petitioner's pleadings and the evidence against him and set aside all findings of the jury favorable to the Petitioner, while upholding every finding of the jury favorable to the Respondent. The Court of Civil Appeals seized upon wording of Petitioner's pleading to the effect that respondent was negligent because of lack of sufficient help or sufficient tools to put the burden on Petitioner of proving both insufficient help and lack of proper tools in order to recover, thus construing Petitioner's pleading as requiring him to prove two acts of negligence against the Respondent in order to recover, ignoring that part of Petitioner's pleadings quoted in the statement above wherein the Petitioner enumerated acts of negligence of the Respondent, including insufficient help and lack of proper tools, and pled that they jointly and severally caused the Petitioner's injury.

The trial court tried the case on the theory that the above acts of negligence were pled as individual acts which each proximately caused the Petitioner's injuries, submitted the case to the jury on that theory and rendered judgment accordingly on the verdict of the jury.

Not only the pleadings of the Petitioner but the evidence, particularly if construed in favor of the verdict of the jury and the judgment of the trial court, supports the jury's findings that the railway company did not furnish Petitioner proper tools, and that this failure to furnish proper tools was negligence and the proximate cause of Petitioner's injuries. The railway company offered no evidence. [fol. 293] Pullman Palace Car Co. v. Nelson

(Court of Civil Appeals Galveston)

54 S. W. 624

> "When the proof tends to establish a fact, and at the same time discloses that it is within the power and to the interest of the opposing party to disprove it, if false, the silence of the opposing party not only strengthens the probative force of the affirmative proof, but of itself is clothed with a certain probative force."

The same rule was applied in

Texas & P Ry Co. v. Riley
(Court of Civil Appeals Texarkana)
183 S. W. (2) 991, 994 writ of error refused,
certiorari denied 65 S. Ct. 1414, 325 U. S. 873, 89 L. Ed. 891

Where as in the Deen case the railway company rested at the end of the plaintiff's case without offering any evidence, and the Appellant Court in passing on the sufficiency of the evidence to support the findings of the jury made this comment:

> "Moreover these circumstances are materially strengthened by the failure of the Appellant to offer any explanation of the occurrence resulting in Riley's death which would excuse it."

The steel pot with its contents weighed about ½ ton. The railway company had provided a hoist to lift it on and

off the furnace. The hoist was not so equipped that it could be used to over-turn the pot once it reached the floor and empty out the contents. If the railway company had any scientific or practical reason why the pot had not been equipped so it could be over-turned by the available hoist it did not give the benefit of that information to the court or the jury. The railway company's employee and blacksmith Snow testified that the steel pot should have been equipped with I clamps so that it could be gripped by the arms of the crane and overturned. He said he could make them in his near-by blacksmith shop. On page 22 of its Brief filed in the Court of Civil Appeals the railway company stated Deen had done this particular job many times and "knew more about it than any one." The man whom [fol. 294] the railway company said knew more about this job than any one said the pot should have been equipped with I clamps so that it could be overturned by the arms of the available crane. The fact that this job had been done by manual labor many times before certainly wasn't conclusive on the point that tools were not necessary and did not preclude the jury from so finding in view of the evidence in the record. That heavy objects should be so equipped that they could be moved by an available crane seem so reasonable and practical that the Court should take judicial knowledge thereof even in the absence of evidence:

> Swann v. T & P Ry Co.
> (Court of Civil Appeals Texarkana)
> 200 S. W. 1131
>
> "The existence of hoisting machinery which may be employed for lifting heavy weights is a matter of such common knowledge that evidence to that effect was not required."

In so far as the Court of Civil Appeals rejected the tools suggested by Deen and Snow on the ground that there was no proof that such tools were in use, were safe or approved the decision of the Court of Civil Appeals is in direct conflict with a decision of the Court of Appeals at Galveston, writ of error refused, in

Galveston, H & S A Ry Co. v. Brewer
(Court of Civil Appeals, Galveston, writ of error refused)
4 S. W. (2) 320

Plaintiff worked for the defendant railway company in its yards at Yoakum, Texas. He assisted in loading heavy timbers called "stringers" on defendant's cars. The timbers were lifted by a hoisting machine. The hoisting machine consisted of a power appliance, a crane, pulleys and chains, and hooks. The hooks were securely fastened to the timber, a signal given and the timber raised to the car. On the particular occasion one of the hooks loosened and permitted a timber to fall and hit plaintiff in the back, [fol. 295] causing him serious injury. Plaintiff alleged among other things that the defendant was negligent in failing to provide him with proper tools and appliances so that the grappling hooks would remain securely fastened and would not have permitted the timber to fall. The Defendant pled that the hoisting machine, with all of its parts, was in perfect condition; that it was scientifically constructed and was in general use by railroads and other companies in this kind of work. Apart from defensive issues, the only issues propounded to the jury was whether the defendant was negligent in its method of fastening the grappling hook chains to the pulley chain and whether such negligence was the proximate cause of plaintiff's injury. The jury returned a verdict for the plaintiff and the court rendered judgment thereon. The railroad contended the evidence was not sufficient to support the verdict. Plaintiff's evidence as in the Deen case consisted of his own testimony and the testimony of fellow employees. Plaintiff contended that the two chains leading to the timber were not joined and that if at the top they had been connected with a ring or if a lock had been placed over the top of the hook where the two ends of the grappling hook chains were placed, they could not have slipped off. The cross-examination of the witnesses reads about like the cross-examination of the witnesses in the Deen case. Notice

the summary of a part of the cross-examination as summarized by the court on page 326 of the opinion:

> "I don't know of anything to prevent such an appliance—one that is fastened—from being made. I have never seen one. There are such things made, but in all the hoisting machines and cranes I've seen, I never saw one in use like that anywhere. I was in the Navy a little better than two years, since the war, and never saw any of them in the United States Navy made that way. I never saw a locked hook."

The Appellant in the Deen case developed similar evidence on the cross-examination of our coppersmith and blacksmith witnesses (S. F. 99, 119). On page 38 of Appellant's [fol. 296] Brief, Appellant vigorously attacks the evidence of the coppersmith and blacksmith in these words:

> "The most that can be said is that two witnesses invented some untried, untested appliance which they could not know and the jury could not know would work, which might have been more dangerous than the other method, and which had never been used in the history of man as far as the records show. Will that support a jury finding of a failure to furnish proper tools and negligence in not furnishing them?"

Here is the answer the Court of Civil Appeals at Galveston in the Brewer case gave to a similar question:

> "We cannot agree with appellant that this evidence does not raise the issue of negligence on its part in not having the chains attached to the grappling hooks more securely fastened to the large hook at end of the crane or pulley chain. The evidence introduced by appellant to the effect that the hoisting machine and the apparatus connected therewith was scientifically constructed and the kind in general use for the purpose of hoisting heavy timbers and other materials was not conclusive upon the issue of whether ordinary care required the appellant to have the chains to which the grappling hooks were attached more securely fastened to the hook on the end of the crane.

> The evidence shows that such security could have easily been obtained by the simple substitution of one ring for the two separate rings to which the chains attached to the grappling hooks were fastened, or by placing an automatic snap or lock over the opening of the large hook on which the rings at the end of the chains on the grappling hooks were hung. That either of these simple changes would greatly protect appellant's employees engaged in the operation of the hoisting machine from the danger of injury from falling timbers, or other materials which they were using the machine to hoist, is obvious. Upon this evidence we think the jury was authorized to find, as they did, that appellant 'failed to furnish plaintiff reasonably safe appliances with which to perform the labor he was engaged in at the time of his injury,' and that 'such failure' on the part of the defendant was the proximate cause of the injury to plaintiff."

We submit the pleadings of Petitioner and the evidence amply supported the verdict of the jury and the judgment [fol. 297] of the trial court that the railway company was negligent in failing to provide Deen proper tools and such negligence was a proximate cause of the injuries of the plaintiff.

Petitioner in the statement above has set out the evidence bearing on the issues of the company's failure to furnish sufficient help and Deen's negligence in failing to avail himself of additional help. The jury found (1) that the railroad did not fail to furnish one or more additional men other than Snow to assist plaintiff in removing the babbitt from the melting pot and (2) that Deen was negligent in failing to obtain additional help and this was a proximate cause of his injuries (Tr 60-67). These issues, apart from the issue that the railway company did not fail to give the plaintiff proper supervision, were the only issues answered by the jury favorably to the railway company. All other issues were answered favorably to the Petitioner, Deen. The Court of Civil Appeals has seized on the issues that Deen was negligent in failing to obtain additional help and this was a proximate cause of his injuries to reverse the

judgment of the trial court and to render judgment that Deen take nothing. To do this the Court had to brush aside the issues dealing with the failure to furnish proper tools, heretofore discussed and had also to brush aside issues bearing directly on the fact questions whether Deen's negligence was the sole cause of his injuries. The Court of Civil Appeals attached great importance to the jury's finding that Deen was negligent in failing to obtain additional help. The Court of Civil Appeals attached no importance to the jury's findings (1) that Deen was not negligent in the manner and method that he used to do the work (2) that the sole proximate cause of plaintiff's injuries was not due to his own act and conduct and (3) that plaintiff's own negligence should reduce the recovery $17,550 or 45%. The jury did not find that Deen's negligence should defeat his recovery entirely or reduce his recovery 100% as the Court of Civil Appeals has done.

[fol. 298] The Respondent in his pleadings in the trial court as indicated in the statement alleged that if the railway company did fail to furnish adequate help that the absence of such help was due to the contributory negligence of the Petitioner. In the trial court the Respondent took the position that the absence of additional help for the Petitioner could not be a proximate cause of the injuries sustained. This theory was advanced in the cross-examination of Deen.

"Q. And the strain in getting it (the melting pot) up was over before it (the babbit) fell on your foot?

"A. (Deen) Yes, sir.

"Q. As a matter of fact, these extra men would have been helpful to you only in getting it up-right; is that right, Mr. Deen?

"A. Yes, sir.

"Q. And whether there had been five or ten men there would not have had anything to do with the babbitt falling out of the pot?

"A. No, sir.

"Q. It would have fallen out if the whole shop had been there with you?

"A. It might have fell on two of us." (S. F. 77).

In its Motion for an Instructed Verdict, Respondent urged "it is undisputed that as far as the accident itself is concerned, additional employees could not and would not have prevented this happening." (Paragraph V Defendant's Motion for an Instructed Verdict, Tr. 23). In its objections to the court's charge the Respondent again advances his theory that the absence of additional men had nothing to do with the accident:

> "Defendant objections (objects) and excepts to special issue No. 6 for the reason that under the undisputed evidence the failure to furnish one or more additional men was not and could not be a proximate cause of plaintiff's injuries." (Paragraph VIII, Defendant's Objections to the Courts' Charge, Tr. 35).

Isn't it a travesty on justice that the Court of Civil Appeals says Deen cannot recover becauss of an act that the railway [fol. 299] company in the trial court said had nothing to do with his accident?

The Court of Civil Appeals not only ignores the jury's findings (1) that the railway was negligent in failing to furnish proper tools, (2) that Deen was not negligent in the manner and method used in doing the work, (3) that the railway company could reasonably anticipate that Deen would do the job in the way and manner that he did, (4) that the sole proximate cause of plaintiff's injuries was not due to his own acts and conduct and (5) that plaintiff's own negligence should only reduce the amount of his recovery, not defeat it, in rendering judgment against the Petitioner, Deen, but also construes the jury's finding that Deen was negligent in failing to obtain additional help into a finding that with additional help Deen could have done the job safely. Petitioner submits the proper construction of the jury's verdict is that while the railway company was negligent in failing to so equip the pot that it could be overturned by an available crane and this was a proximate cause of the accident that in spite of the railway company's failure to perform its duty in this respect that Deen was also negligent in trying to do the job without additional help and this also was a proximate cause of the accident. Both acts contributed to the accident. Deen was entitled to recover because of the railway company's negligence

but his recovery should be reduced under the Federal Employer's Liability Act because of his own negligence. This is the way the case was submitted to the jury at the request of the railway company. But the Court of Civil Appeals makes the contributory negligence of Deen the sole cause of the accident despite a jury finding to the contrary and uses this finding of contributory negligence to defeat his claim entirely contrary to the provisions of the Federal Employer's Liability Act. In

[fol. 300] M K T R R Co. v. Webb

(Court of Civil Appeals Waco, writ refused, n.r.e.)

229 S. W. (2) 204, 208

the Court said:

> "The Act (Federal Employer's Liability Act) in Sec. 53 thereof expressly abolished the common-law defense of contributory negligence as a complete bar to the right of an injured employee to recover damages on account of injuries proximately caused by the negligence of his employer but provided that in the event the employee was guilty of contributory negligence his compensatory damages should be diminished by the jury in proportion to the amount of negligence attributable to such employee."

The construction of a federal statute is involved in this case. The decisions of the federal courts are controlling. The federal cases that Petitioner has found to be the closest on the facts and the law are:

Clyde Wilkerson v. Wilson McCarthy and Henry Swann, as Trustee of Denver & Rio Grande Western R R Co.

93 L. Ed. 497, 336 U. S. 53

Va Ry Co. v. Viars

193 F (2) 547

United States Court of Appeals, 4th Circuit

Petitioner will first discuss the Wilkerson case, supra. In this case the employee of the railroad was injured by a fall

while walking over a pit on a narrow plank which he contended was not firmly set and was oily. The railroad admitted the accident occurred in the manner stated but denied negligence. The evidence showed that the company had not forbidden its employees to use the plank but had put chains on posts around it. One narrow place was left where an employee could squeeze through and use the plank. The trial court instructed a verdict for the defendant and this was affirmed by the Supreme Court of Utah. The court held the posts and chains were the equivalent of an order not to use the plank. The Supreme Court of the United States granted a writ of certiorari and reversed the case. [fol. 301] In its opinion the Supreme Court again reiterated that courts must not deprive the employee of the right of trial by jury in these cases and in the course of its opinion said:

> "While this left only a very narrow conflict in the evidence it was for the jury, not the court, to resolve the conflict."

The court continues:

> "There was, as the state court pointed out, evidence to show that petitioner could have taken a sligthly longer route and walked around the pit, thus avoiding the use of the board. This fact, however, under the terms of the Federal Employers Liability Act, would not completely immunize the respondents from liability if the injury was 'in part' the result of respondents' negligence. For while petitioner's failure to use a safe method of crossing might be found by the jury to be contributory negligence, the Act provides that 'contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee'."

The same point was before the United State Court of Appeals, 4th Circuit, in

Va Ry Co. v. Viars, 193 F 2nd 547

Here the railway employee was electrocuted while exploding dynamite. The court said:

> "It is said, also, that because the plaintiff might have used a fuse with the dynamite, instead of the electric equipment, or might have used picks and shovels without dynamite, even though it might have taken longer, he elected to use a dangerous rather than a safe method of doing his work and is thereby precluded from recovery. There was evidence, however, that the use of fuses in exploding the dynamite was more dangerous than the use of electrical equipment; and, on the evidence of plaintiff, the picks and shovels had been tried without success. If, however, plaintiff adopted a dangerous way of doing the work, when a safe one was open to him, this amounted to nothing more than assumption of risk or contributory negligence, neither of which excuses defendant's negligence or bars recovery under the Federal Employers Liability Act. Tiller v. Atlantic Coast Line Ry Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610; Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497. If plaintiff was guilty of negligence in using the dyna- [fol. 302] mite, this did not bar him of recovery, if defendant was also guilty of negligence which contributed to his injury but went merely to the reduction of damages. This aspect of the case was fairly presented by the trial judge in his charge to the jury."

On page 98 of the Brief of the Respondent filed in the Court of Civil Appeals the Respondent refers to the trend in the Supreme Court of Texas to see that the defendant gets a fairer trial. If there is such a trend, Petitioner is certain that the Honorable Supreme Court does not intend that such trend be carried to the point of depriving a party of his right of trial by jury.

Petitioners show the Court that the attorneys for Respondent are

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Messrs. Woodruff & Holloway
Attorneys at Law
Brownwood, Texas

[fols. 303-304] The Petitioner prays that upon consideration of this petition, writ of error be granted, and that, upon final hearing, the judgment of the Court of Civil Appeals be reversed and that of the trial court affirmed.

David C. McCord
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Robert Lee Guthrie
Robert Lee Guthrie
519 Mercantile Bank Bldg.
Dallas, Texas
Attorneys for Petitioner

Duly sworn to by Robert Lee Guthrie. Jurat omitted in printing.

[fol. 305] IN THE SUPREME COURT OF TEXAS

[Title omitted]

RESPONDENT'S REPLY TO APPLICATION FOR WRIT OF ERROR—FILED APRIL 12, 1955

To the Honorable Supreme Court of Texas:

Now comes the Gulf, Colorado and Santa Fe Railway Company, Respondent in this cause, and files this its reply to the Application for Writ of Error by Petitioner, Earl R. Deen. Petitioner Earl R. Deen was Plaintiff in the trial court and Respondent Gulf, Colorado and Santa Fe Railway Company was Defendant in the trial court, and they are so referred to in the opinion of the Court of Civil Appeals, and they will be so referred to in this reply brief.

Statement as to the Jurisdiction of This Court

Respondent cannot admit jurisdiction of this Court in this cause, under Sub-division 6, of Article 1728, R.C.S. 1925, as amended, because the Court of Civil Appeals has committed no error of substantive law.

Statement of the Case

The opinion of the Court of Civil Appeals in this case contains a very detailed and extensive statement of the pleadings, the evidence, and the jury's findings. The Plain-
[fol. 306] tiff's statement of the pleadings, evidence and the jury's findings contained in the Application for Writ of Error is, we think, rather obviously less complete and less accurate. Because of the detail with which the Court of Civil Appeals dealt with the facts, the pleadings, and the jury findings, we will not refute the Plaintiff's statement in detail, but there are one or two matters on which it is, in our judgment, essential that the record be set straight.

In the first place, and most importantly, the Plaintiff's application repeatedly states, and more often implies, that Earl R. Deen has been denied a jury trial on the issues of liability. This is simply not the truth. There were submitted to the jury three issues of negligence on the part of the Defendant Railway Company. The first was failure to furnish sufficient help to do the work in safety. The second was failure to furnish proper tools to do the work in safety. The third was failure to furnish proper supervision. The *jury* found against the Plaintiff on the issue of failure to furnish sufficient help and on the issue of proper supervision, and in favor of the Plaintiff on the issue of failure to furnish proper tools. The jury, therefore, found that the Plaintiff was properly supervised, that he was furnished sufficient help to do the work in safety, and that the Defendant failed to furnish proper tools to do the work in safety. The holding of the Court of Civil Appeals is that the jury found against the Plaintiff on the essential issues, and that on the jury verdict, the Defendant was entitled to judgment. This case is not, as Plaintiff repeatedly indicates, a case where the Court of Civil Appeals held that the Motion for Instructed Verdict should have been given.

What actually happened was that after the jury trial, the Defendant filed a motion for a judgment on the jury's verdict, and motion for judgment on said verdict, disregarding Issues 1, 2, and 3 (Tr. p. 60), which included, as ground for said motion, the proposition that said Issues 1,

2, and 3 should be disregarded for the reason that they were without support in the evidence (Paragraph 3, Tr. p. 78-73) and also that there was no duty under the law to furnish the Plaintiff with two safe ways to do the work, and [fol. 307] the jury having found that there was sufficient help furnished, and that the Plaintiff was negligent in not availing himself of it, the jury's verdict was a complete discharge of Defendant's legal obligation. (See same motion, beginning at Tr. p. 60). The holding of the Court of Civil Appeals was that the trial court should have granted the Defendant's said motion and entered judgment in favor of the Defendant. We particularly point this out because the Plaintiff's application is subject to the construction that the Court of Civil Appeals completely disregarded the jury's verdict.

The Plaintiff's able attorneys presented the identical argument they make in their application to the Court of Civil Appeals originally, and also in their motion for rehearing. In their motion for a rehearing, they virtually conceded that under the jury's verdict and the admitted facts, the Court of Civil Appeals had correctly applied the law. We quote from the Plaintiff's motion for a rehearing in the Court of Civil Appeals, Page 6:

> "We ask the Honorable Court of Civil Appeals not to close the door on this Plaintiff's claim, even though, *because of innate honesty and lack of intelligence, he made some general admissions that a more wily and dishonest person would not have been lead into.*"

We do not think that because a less truthful plaintiff could have made out a jury case on tools or some other point, that the Plaintiff in this case ought to have relief from either his honesty or the jury's verdict.

Counter-Points

First Counter-Point

The Court of Civil Appeals correctly held that there was no duty on the Respondent, as an employer, to furnish the Petitioner, as an employee, with several safe ways to do

his work, and under the jury's finding that the Respondent furnished to the Petitioner adequate help and that Petitioner was negligent in failing to avail himself of said help, a safe way to do the work had been furnished and there was no duty upon the Respondent to design or furnish tools to do the work in some other fashion.

[fol. 308] Second Counter-Point

The Court of Civil Appeals correctly held that the jury's findings in response to Issues 1, 2, and 3, that the Respondent failed to furnish proper tools to remove the babbitt and that such failure was negligence and a proximate cause, were not supported by the evidence.

Statement, Argument and Authorities

The Respondent in this case, in writing this reply, is in somewhat of a dilemma. We are well aware of the Court's injunction that this reply be brief, and the Court's assurance that to encourage such brevity, the Court will carefully consider the Court of Civil Appeals' opinion to determine the facts in the case, the pleadings, and the jury's findings. On the other hand, there is in this case more than the normal worry by the Respondent's counsel, that inaccurancies in the Application for Writ of Error, if unchallenged, may leave the Supreme Court with a misapprehension as to the true situation.

This brief will represent a compromise; that is, we will try to nail some of the larger inaccurancies briefly and leave others for comparison with the Court of Civil Appeals' opinion. In the interest of brevity, we will not set up long quotations from the Application for Writ of Error and answer them, but will handle the matter generally.

The entire burden of the Application for Writ of Error is that the Plaintiff in this case was denied a jury trial, and the application would make it appear that the Court of Civil Appeals held that the Motion for Instructed Verdict was proper. Neither of these are true. There was a jury trial and the Court in its charge submitted to the jury three issues of negligance on the part of the Defendant. The first was the failure to furnish proper tools. The

second was failure to furnish sufficient help. The third was failure to furnish proper supervision. As pointed out by the Court of Civil Appeals, there were issues of contributory negligence also submitted, but in view of the Court of Civil Appeals' holding that on that jury verdict the De-[fol. 309] fendant was entitled to judgment, the diminution of recovery because of such contributory negligence now has no importance. The Court of Civil Appeals, on Page 3 of its opinion, has set out the jury findings in detail. On that verdict, the Plaintiff moved for judgment and the Defendant moved for judgment on such verdict and for judgment disregarding Issues 1, 2, and 3 (Tr. p. 60), Issues 1, 2, and 3 being the issues that found that the Defendant failed to furnish tools, that same was negligence and a proximate cause. The trial court granted the Plaintiff's motion for judgment on such verdict, and the Court of Civil Appeals, in its opinion, held that the Defendant's motion for judgment on the jury verdict and disregarding Issues 1, 2, and 3, should have been sustained. Just to keep the record straight, that is what happened. The Plaintiff had his jury trial and he lost it on the material issues in the case.

The Court of Civil Appeals advanced two reasons for holding that the Defendant was entitled to judgment on the jury's verdict. In the first place, it sustained the Defendant's legal proposition that the employer has no obligation to furnish to the employee several safe ways to do the work. The employer, when he has furnished a means or method by which the work can be done in reasonable safety, has fulfilled his entire obligation. The jury having found that the Defendant Railway Company had furnished sufficient help so that the work could have been done in safety, it had fulfilled its entire duty; hence, the finding of failure to furnish tools was immaterial because no duty existed to both furnish sufficient men to do the work in safety and to also furnish sufficient tools to do it in safety without the additional help. The Plaintiff does not here attack the soundness of that proposition of law. Text statements of the rule will be found in 39 *Corpus Juris* (Master and Servant), Sections 447, 448 and 449; 35 *Am. Jur.*, Sections 175, 178, 179 and 180. Cases stating the rule and applying it to

situations like that presented by this case are: *Atlantic Coastline R. Co.* vs. *Dixon* (Fifth Circuit—Cert. denied), 189 Fed. (2) 525; *B. & O. R. Co.* vs. *Groeger*, 266 U.S. 521; 45 S. Ct. 169, 69 L. Ed. 419; *L. & N. R. Co.* vs. *Davis* (Sixth [fol. 310] Circuit), 75 Fed. (2) 849; *Thomson* vs. *Penn R. Co.* (Sixth Circuit), 88 Fed. (2) 148; *McGivern* vs. *Northern Pacific Rwy.* (Eighth Circuit), 132 Fed. (2) 213; *Wolfe* vs. *Hemwood* (Eighth Circuit), 162 Fed. (2) 998; *Fore* vs. *Southern Rwy.* (Sixth Circuit), 178 Fed. (2) 349; *Armstrong* vs. *M. K. T. R. Co.* (Dallas Ct.—N.R.E.), 233 S. W. (2) 942; *Western Union Tel. Co.* vs. *Coker* (Texas Sup.), 204 S.W. (2) 977; *August* vs. *T. & N. O. R. Co.* (Beaumont Ct.), 265 S.W. (2) 148; *Kempe* vs. *Illinois Central R. Co.* (Iowa), 232 N.W. 657; *Truesdell* vs. *C. & O. R. Co.* (Kentucky), 169 S.W. 471; *Lowden* vs. *Bowen* (Okla.), 183 P. (2) 980; *G. M. & N. R. R. Co.* vs. *Madden* (Miss.), 200 So. 119; *Johnson* vs. *Pulliam* (Ft. Worth Ct.), 161 S.W. (2) 589.

Applying the foregoing principles to the facts of this case, the Court of Civil Appeals held (Opinion p. 4):

> "If this contention is correct, the railway company had furnished one reasonably safe way to do the job and it had no duty to furnish a second reasonably safe way, that is, to furnish Deen with tools."

Now that is what the Court held on this point, and that is not what the Plaintiff says the Court held. The Plaintiff, in four places in the application, says that the Court of Civil Appeals held that the Plaintiff's contributory negligence in failing to ask for additional help barred his recovery. For example, on Page 16 of the Application for Writ of Error, the Plaintiff says:

> "The Court of Civil Appeals has seized on the issues that Deen was negligent in failing to obtain additional help and this was a proximate cause of his injuries to reverse the judgment of the trial court and to render judgment that Deen take nothing."

And again, on Page 18 (last sentence):

> ". . . but the Court of Civil Appeals makes the negligence of Deen the sole cause of the accident, despite

> a jury finding of the contrary, and uses this finding of contributory negligence to defeat his claim entirely, contrary to the provisions of the Federal Employers' Liability Act."

They carry it forward in presenting as being in point, the only two cases presented, *Wilkerson* vs. *McCarthy*, 93 L. Ed. 497, 336 U.S. 53, and *Virginia Ry. Co.* vs. *Viars*, 193 F. (2) 547 (both Page 19 of the application). In both of those cases the employer furnished two ways to do the work. One way was safe and one way was unsafe. The defense in those cases was not that presented here, because here the Defendant only furnished one way to do the work—that is, with manpower. In each of those cases the Court [fol. 311] held that the negligence of the employee in choosing the unsafe way was a jury issue, as was the negligence of the employer in furnishing the unsafe way. Had this case been one as the Plaintiff in error represents it to be—that is, one where an instructed verdict had been given—those cases would have some pertinency because this Court could say that the Plaintiff was entitled to have the jury pass on whether the Defendant had furnished adequate help to do the work in safety, and also whether the Plaintiff was negligent in failing to avail himself of the help that was available. This is exactly what was done in this case. They were submitted to the jury and the jury found them against the Plaintiff.

The foregoing seems to be the Plaintiff's attack on the first holding of the Court of Civil Appeals, which was, and we repeat what is said above, that *under the jury's verdict* the Defendant Railway Company furnished to the Plaintiff employee one reasonably safe method of doing the work, to-wit, with sufficient help, and that having furnished one method by which the work could be done with reasonable safety, the Defendant had no duty or obligation to furnish another method, to-wit, tools, by which the work could be done with safety, without additional help. That was the first proposition sustained by the Court of Civil Appeals, and the foregoing was the Plaintiff's attack on it.

The second position sustained by the Court of Civil Appeals was that the evidence was insufficient to support the

jury's finding of negligence in failing to furnish proper tools.

We quote from Page 14 of the opinion of the Court of Civil Appeals:

> "We sustain Appellant's contention that the evidence does not support the finding that Defendant was negligent in failing to furnish tools."

The Plaintiff's attack on the foregoing holding of the Court is twofold, one being that the jury's findings do not constitute a finding that the work could be done with reasonable safety with the additional help that was available, and second, that the evidence raised the issue that even with additional help, the slab could fall out on somebody's leg.

[fol. 312] Again, we cannot accept the Plaintiff's statement of what happened in the jury's verdict. The jury found (Issue No. 4) that the railroad did not fail to furnish one or more additional men to assist the Plaintiff in removing the babbitt from the melting pot. It also found that the Plaintiff was negligent in failing to obtain additional help, and this was a proximate cause of his injuries. The phraseology of the issues submitted by the jury was the phraseology of the Plaintiff's petition. In other words, the Plaintiff, instead of alleging that the Defendant failed to furnish sufficient help to do the work with reasonable safety, alleged that the Defendant was negligent in failing to furnish to the Plaintiff, in addition to Snow, who did help the Plaintiff, one or more additional men. The trial court followed the Plaintiff's pleading of "failure to furnish sufficient help" instead of submitting the standard language, "failed to furnish sufficient help to do the work with reasonable safety". The Court of Civil Appeals said that in the light of the undisputed facts, that the jury's finding that the Defendant did not fail to furnish one or more helpers (in addition to Snow) and that the Plaintiff was guilty of negligence in failing to get additional help, were the jury's finding that the Defendant did furnish sufficient help to do the work with reasonable safety. The very statement of Plaintiff's proposition answers itself, because

the issue of "sufficient help" was submitted in the Plaintiff's own words and the Plaintiff can furnish no basis whatsoever for attacking the Court of Civil Appeals' construction. In fact, an absolutely conclusive answer is that, had the Defendant requested the Court to submit the issue, "Do you find from a preponderance of the evidence that the Defendant furnished sufficient help to do the work with reasonable safety", the trial court could not have submitted such issue under Rule 279 because same would have obviously been merely a different phase of the same issue.

The Plaintiff's second attack is that there was evidence from which the jury could have inferred that the babbitt could have fallen on Deen's leg even with more help.

[fol. 313] To understand the Plaintiff's argument and the fallacies in it, we have to briefly state that what happened here was that the Plaintiff, who was in charge of the babbitt pot, got it out of the furnace and on to the floor. A babbitt pot looks like a kitchen sink and it had in it some hardened babbitt in the bottom, and the Plaintiff desired to get the slab of babbitt out of the old pot so that same could go in the new pot when it, in turn, was placed in the furnace. There was no hurry because the furnace was ready for the new pot, and while the Plaintiff denied it, the jury found that there was plenty of help around to do the work. The Plaintiff and a man b- the name of Snow, at Plaintiff's suggestion, attempted to dump the babbitt out of the pot manually by turning it over. It is just like two boys who wanted to empty water out of a tub or out of a kitchen sink lying on the ground or out of a horse trough, would empty it by turning the tub, kitchen sink or the trough over. The Plaintiff, Deen, had done it this way on at least three prior occasions when he had more help and had done it with safety and without any danger. On this particular occasion, without the additional help, the strain was greater and the two got the babbitt pot on edge and the babbitt came out the way Deen wanted it to, but Deen's leg was in the way. As pointed out by the Court of Civil Appeals, he testified two or three times that with more help he would have been pushing it from him and his leg wouldn't have been in the same place. It was the Defendant's contention in the trial court that even with only one man helping

him, Deen would not have gotten hurt if he had kept his foot out of the way and that, therefore, failure to furnish sufficient help was not the proximate cause of his injury. The jury found that the Defendant did not fail to furnish sufficient help, consequently, the Defendant need not urge that same argument now, but the Plaintiff takes that argument and a portion of the cross-examination of Deen to make it appear that the work was dangerous even with four or five men. They quote from Deen's testimony, (see Application for Writ of Error, p. 17), as follows:

> "Q. And whether there had been five or ten men there would not have had anything to do with the babbitt falling out of the pot?
> [fol. 314] "A. No, sir.
> "Q. It would have fallen out if the whole shop had been there with you?
> "A. It might have fell on two of us." (S.F. 77).

The foregoing, of course, means no more than if Deen was going to be careless and leave his foot in the way where the babbitt could fall on it (and he wanted the babbitt to fall out), he was bouns to get hurt, no matter how many people helped him. The whole of the facts are put in the proper perspective by the Court of Civil Appeals' opinion, and merely to demonstrate that the Plaintiff has picked an isolated quotation, we take the following from Mr. Deen's testimony (S.F. p. 79):

> "Q. All right, sir. Now, being fair, Mr. Deen, with this jury, there wasn't anything dangerous about that, if you kept your feet out of the way, was there?
> "A. It didn't look like it.
> "Q. All right. And, if your foot had been back, it would have fallen out just the way you wanted it to, right on the pavement, on the paved floor of that shop, wouldn't it?
> "A. Yes, sir.
> "Q. All right. Then the decision as to putting your foot in the way was Earl Deen's decision, was it not?
> "A. I suppose it was.
> "Q. Well, did Mr. Snow tell you how to put your

feet, or the foreman or anybody tell you how to put your feet?

"A. No, sir.

"Q. All right, sir——

"A. And nobody didn't tell me to move it.

"Q. Nobody told you to move your foot or to leave it there?

"A. *That's* right."

"Q. All right. The truth about this, Mr. Deen, is that except for that one moment of forgetfulness, the kind of thing that any man could do, you or me or anybody, there wasn't anything wrong with the way that job was done that day, was there?

"A. It don't look to me like there was.

"Q. All right. Outside of that one moment of forgetfulness to get your foot in the way, that was the only thing that was wrong that day, is that right?

"Mr. McCord: I object to that, your Honor, the certain words of forgetfulness; Mr. Deen hasn't testified that he forgot anything.

"Court: I overrule the objection.

[fol. 315] "Mr. McCord: Note our exception.

"Q. There wasn't anything wrong with that operation out there that day, outside of your foot being in the way when that babbit- fell out?

"A. So far as I know.

"Q. There wasn't?

"A. *That's* right."

Obviously, again, the Plaintiff is taking the position in the Supreme Court of the State of Texas, that an instructed verdict was given, ignoring the fact that a jury verdict was returned.

The other two attacks on the Court of Civil Appeals' finding that the evidence was insufficient to support the jury's finding of failure to furnish proper tools, is a claim that because the Defendant put on no evidence that the Plaintiff's case was thereby greatly strengthened.

Again, the Plaintiff has ignored both the actual happenings in the case and the law. The Defendant put on no evidence whatsoever and rested when the Plaintiff did. In such case, no presumption or inference may be drawn from

the failure to call witnesses or put on evidence. In other words, a party who relies on the failure of the opposite party sustaining the burden of proof has a right to rest, and doing so does not strengthen the other party's case. We quote from 22 *C.J.*, Sec. 56, Page 120:

> "Where a party calls no witness, but submits his case in reliance upon the insufficiency of his adversary's evidence no unfavorable inference arises from his failure to call witnesses having special knowledge."

The above rule was applied by the Supreme Court in the case of *T. & P. Rwy. Co.* vs. *Shoemaker,* 98 Tex. 451. See Page 456. See also, *G. H. & S.* vs. *Landeros,* (Civ. App.), 264 S.W. 524, and *Turner* vs. *Texas Company* (Sup. Ct.), 159 S.W. (2) 112.

The last attack is on the basis that the decision of the Court of Civil Appeals is in "direct conflict with the decision of the Court of Appeals at Galveston, writ of error refused, in *Galveston, H. & S. A. Rwy. Co.* vs. *Brewer,* 4 S.W. (2) 320", (Application, p. 13). Such attack may be disregarded because the Plaintiff did not claim conflict of decision as a ground of jurisdiction. Also, of course, the facts of the case demonstrate that there is no conflict between the holding in this case and the holding in the Brewer [fol. 316] Case. Without going into detail (this is longer than we intended it to be now), in the Brewer Case the Defendant was charged with furnishing machinery which was dangerous to do the job with unless certain safety measures were taken. The parallel would exist had the Defendant required the Plaintiff in this case to do his work with the chain hoist which was furnished. That is diametrically opposed to the facts in this case (and in fairness, the Plaintiff does not contend to the contrary), because here the method by which the Plaintiff was to do his work was with manual help, and, in fact, that is the way he had always done it before and the way he did it on this occasion was "by hand". The possibility of using the hoist was thought up on the witness stand and certainly the Plaintiff cannot now say that because he says the hoist might have been used, and he further says it couldn't be used with safety without some clamps or eye-bolts, that the Defendant was

guilty of negligence in failing to furnish the clamps and eye-bolts. There is no conflict with the Brewer Case.

Conclusion

Contrary to Plaintiff's repeated statements, this is not a case where the trial court instructed the jury to find for the Defendant, nor one in which the Court of Civil Appeals held that an instructed verdict should have been given, and therefore reversed and rendered. The Plaintiff had a jury trial and the jury found against him on the material issues. The trial court erroneously construed that verdict as being one for the Plaintiff and the Court of Civil Appeals correctly held that the jury's verdict required a judgment for the Defendant.

This Plaintiff has not been mistreated by either the jury or the Court of Civil Appeals and no grounds exist for granting a Writ of Error to correct a just verdict and a correct decision by the Court of Civil Appeals.

Wherefore, premises considered, the Respondent, Gulf, Colorado and Santa Fe Railway Company, respectfully [fols. 317-318] prays that the Application for Writ of Error be refused, or in the alternative, that it be refused, N.R.E.

Respectfully submitted, Woodruff & Holloway, Attorneys at Law, First National Bank Bldg., Brownwood, Texas. Hudson, Keltner & Sarsgard, By: Luther Hudson, Luther Hudson, 1313 Continental Life Bldg., Fort Worth 2, Texas, Attorneys for Defendant, Gulf, Colorado and Santa Fe Railway Company.

[fol. 319] IN THE SUPREME COURT OF THE STATE OF TEXAS

EARL R. DEEN

vs.

GULF, COLORADO & SANTA FE RAILWAY COMPANY

ORDER REFUSING WRIT OF ERROR—JUNE 29, 1955

This day came on to be heard the *application of petitioner for a writ of error* to the Court of Civil Appeals for

the Eleventh District and the same having been duly considered, and the Court having determined that the application presents no error which requires the reversal of the judgment of the Court of Civil Appeals, it is ordered *that the application be refused;* that the applicant, Earl R. Deen, pay all costs incurred on this application.

[fol. 320] IN THE SUPREME COURT OF THE STATE OF TEXAS

[Title omitted]

MOTION FOR REHEARING OF APPLICATION FOR WRIT OF ERROR—FILED JULY 13, 1955

To the Honorable Supreme Court of Texas:

Now comes the Petitioner in the above matter and files this his Motion for Rehearing of his Application for Writ of Error and as grounds therefor respectfully represents as follows:

1.

The Honorable Court of Civil Appeals in its judgment and The Honorable Supreme Court in refusing Petitioner's Application for Writ of Error have deprived this Petitioner of his right of trial by jury, which was given to him by Congress under the Federal Employers Liability Act (45 USCA Sec. 53), in that each of these courts has found that all findings of the jury in favor of the railway company are supported by the evidence while all findings of the jury against the railway company are not supported by the evidence.

2.

The Honorable Court of Civil Appeals in its judgment and The Honorable Supreme Court in refusing Petitioner's Application for Writ of Error have deprived this Petitioner of his right of trial by jury, which was given to him by [fol. 321] Congress under the Federal Employers Liability Act (45 USCA Sec. 53), in that each of these Courts have attached great importance to the jury findings: (1) that

the railroad did not fail to furnish one or more additional men other than Snow to assist plaintiff in removing the babbitt from the melting pot, (2) that Deen was negligent in failing to obtain additional help and (3) this was a proximate cause of his injuries, while each of the Courts attached no importance to the jury's findings:

(1) The railway company was negligent in failing to furnish Deen proper tools;

(2) This was a proximate cause of the accident;

(3) That the plaintiff was not negligent in the manner and method used in doing the work;

(4) That the railway company could reasonably anticipate that the plaintiff would do the job in the way and manner that he did;

(5) That the sole proximate cause of plaintiff's injuries was not due to his own acts and conduct;

(6) That plaintiff's own negligence should reduce the amount of his recovery (not defeat it entirely).

3.

The Honorable Court of Civil Appeals in its judgment and The Honorable Supreme Court of Texas in refusing Petitioner's Application for Writ of Error have ignored the decisions of The Honorable Supreme Court of the United States interpreting and construing the Federal Employers Liability Act in which the Supreme Court of the United States has made it clear it will not permit employees under the Federal Employers Liability Act to be deprived of a jury trial in close or doubtful cases, and be deprived of a goodly portion of the relief which Congress has afforded them. The Supreme Court of the United States has made it clear it will not permit a Court to substitute its findings for that of the jury. The state courts have thus [fol. 322] decided a federal question of substance in a way not in accord with applicable decisions of the Honorable Supreme Court of the United States.

4.

The state courts have denied this Petitioner of the right of trial by jury in a suit a common law where the value in

controversy exceeds twenty dollars contrary to the *the* Twelfth Amendment of the United States Constitution.

5.

The Honoroble Supreme Court has erred in refusing the Application for Writ of Error for all the reasons set out in Petitioner's Application which is referred to and made a part hereof as if fully copied herein.

Argument

Petitioner reminds the Honorable Supreme Court of the words of Mr. Justice Holmes in Aikens v. Wisconsin, 195 U.S. 194, 206, 49 L. Ed. 154, 160, 25 S. Ct. 3.

> "But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proven."

Petitioner is unable to understand why the Honorable Court of Civil Appeals has had no difficulty in accepting the findings of the jury in favor of the railway company but experienced great difficulty in accepting any finding of the jury against the railway company. Wouldn't it be rather unusual for a jury to properly weigh the evidence in all findings in favor of the defendant but to improperly weigh the evidence in all findings against the defendant?

In this case the decisions of the federal courts are controlling since a federal statute is involved. The ultimate and controlling authority is The Supreme Court of the United States. The Honorable Court of Civil Appeals in its opinion completely ignored the decisions of The United States Supreme Court and did not cite a single authority from that Court in support of its decision although five [fol. 323] recent decisions of The United States Supreme Court in Federal Employers Liability cases were brought to its attention in our brief. Since 1939 for the guidance of state and federal courts in cases arising under the Federal Employers Liability Act, the Honorable Supreme Court of the United States had made it clear:

> (1) The jury is the fact finding body under the Federal Employers Liability Act and the courts are not

to substitute their findings for the jury even in close and doubtful cases;

(2) The act is to be liberally construed in favor of the injured workman;

(3) Findings of railway engineers, scientists and other experts as to what is essential for the safe operation of the railroads are not conclusive on a jury;

(4) Congress has obliterated from the Act every vestige of the doctrine of assumption of risk and the same defense must not be allowed by simply changing its name to non-negligence.

Justice Douglas in a concurring opinion in Clyde Wilkerson v. Wilson McCarthy and Henry Swann, as Trustees, of Denver & Rio Grande Western R. Co., 93 L. Ed. 497, 336 U.S. 53, says:

"The Federal Employers Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations."

The Honorable Court of Civil Appeals at Beaumont in comparing Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 63 S. Ct. 144, 87 L. Ed. 610, 143 ALR 967 with Toledo St. L. & W. Ry. Co. v. Allen, 276 U.S. 165, 48 S. Ct. 215, 72 L. Ed. 513, made this comment:

"In construing the effect of the 1939 Amendment to the Federal Employers Liability Act the court held that the amendment obliterated from the law every vestige of the doctrine of assumption of risk and did not leave open the identical defense for the master by changing its name to non-negligence, stating that that court had held in facing the hazy margin between negli- [fol. 324] gence and assumption of risk as involved in Safety Appliance Act of 1893, 45 U S. C. A., § 1, et seq., 'unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of risk under another name; and no such result can be permitted here'; and further held that said amendment was clearly aimed at ending the rule announced in Toledo, St. L. & W. Ry. Co. v. Allen, supra."

The Marquette Law Review in a very interesting article entitled, "Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers Liability Act," Volume 29, p. 87 makes this comment which is well borne out by the decisions:

> "When one reads these leading cases decided by the Supreme Court of the United States in this field, it becomes apparent the court is entirely out of sympathy with the earlier cases where the verdicts were set aside by the courts on technical or other grounds or on the court's conception of the "reasonable minds agree rule."

With reference to depriving an employee of the right of trial by jury The Supreme Court of the United States has expressed itself in two fairly recent decisions as follows:

> Tennant v. Peoria & P. U. R. Co.
> 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409
>
> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory, that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witness, receives expert instruction and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

[fol. 325] Bailey v. Central Vermont R. R. Co.
319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444
"That method of determining the liability of carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern system of workmens' compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In an appendix to the decision of The Supreme Court in Clyde Wilkerson v. Wilson McCarthy and Henry Swann as Trustees of Denver & Rio Grande Western R. Co., 93 L. Ed. 497, 336 U. S. 53, the Supreme Court has attempted to make it clear how strongly it feels about the right of trial by jury in Federal Employers Liability Cases. It sets out 16 cases decided between 1943 and 1948 in which writs of certiorari were granted and the lower court was reversed for taking a case from the jury or for setting aside a jury verdict in favor of the employee. Since 1948, the Court has not departed from its rulings so strongly pronounced in these cases.

So far as we have been able to ascertain, the Deen case is unique in that both the jury and the trial judge concurred in awarding damages to the plaintiff. In the cases we have read before The Supreme Court of the United States, it was the trial judge that interferred with the jury verdict. In the Deen case, we have three appellate judges who have not seen or examined any witness who in effect say that by merely reading a record they can determine the facts more correctly than the jury and the trial judge. The Court cannot say that this was a jury that was biased and prejudiced and found the facts against the defendant regardless of the truth. If one reads their findings, one sees that the jury has tried conscientiously to find the truth. Certain answers were favorable to the defendant. To write around their verdict and the judgment of the trial court, the Court of Civil Appeals had to read into the verdict [fol. 326] something that was not there, that additional

help would have enabled Deen, the plaintiff, to do the job safely, and the Court of Civil Appeals had to disregard all findings of the jury favorable to the plaintiff while giving full force and effect to all findings favorable to the defendant. Surely it is not true that the constitutional tribunal functions properly only when making findings for the defendant. In its role, as a fact finding agency, the Court of Civil Appeals found Deen's failure to obtain additional help, as found by the jury, was controlling in the case and was conclusive against the plaintiff's claim. This finding by the Court of Civil Appeals was more favorable to the defendant than the defendant's own interpretation of the facts. In the trial court, the defendant contended "additional employees could not and would not have prevented this happening." (Tr. 23, also Application for Writ of Error, p. 17). Isn't it a travesty on justice that this plaintiff under the decision of the Court of Civil Appeals will receive no compensation for being permanently crippled in the course of his employment because of a fact that the railway company says had nothing to do with the accident?

Petitioner believes under the decisions of The United States Supreme Court construing the Federal Employers Liability Act he is entitled to have the jury verdict and the judgment of the trial court awarding him damages sustained. The Supreme Court of the United States has made it clear how strongly it feels about the right of trial by jury in cases of this kind. Petitioner hopes that the Honorable Supreme Court of Texas will see its way clear to hear his case and not put him to the tremendous expense of asking The Supreme Court of the United States to give him the rights he feels he is entitled to under the Federal Employers Liability Act. Is this case so clear that the Honorable Su- [fols. 327-328] preme Court can say that the Honorable Court of Civil Appeals was right in telling the plaintiff, Deen, in effect to limp through life without any compensation because of his zeal in trying to do his master's work alone without additional help, despite the fact that the defendant says additional help could not and would not have prevented the accident? The plaintiff is not a dead beat. If he were negligent in not getting additional help,

his negligence arose out of his zealousness to do his master's work. The defendant on page 23 of his Brief filed in The Court of Civil Appeals,

> "Again we say that a less conscientious man than Deen probably would have sat and waited for the storeroom crew to arrive but Deen, on his own volition, without any orders, decided that he might as well dump the babbitt then as later and made the attempt."

Page 4, Defendant's Brief

> "Deen, without any orders from anybody, but realizing that the old pot would have to be out so that the new one could be put in, and being desirous of getting it into use as quickly as possible * * *."

Petitioner shows the Court that the attorneys for Respondent are:

Messrs. Hudson, Keltner & Sarsgard
1313 Continental Life Building
Fort Worth, Texas
Messrs. Woodruff & Holloway
Attorneys at Law
Brownwood, Texas

and they have been mailed a copy of this Motion for Rehearing.

Petitioner prays that upon consideration of this Motion, the order refusing Writ of Error be set aside and that Writ of Error be granted and that, upon final hearing, the judgment of the Court of Civil Appeals be reversed and of the trial court be affirmed.

David C. McCord
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Dallas, Texas
Robert Lee Guthrie
Robert Lee Guthrie
519 Mercantile Bank Bldg.
Dallas, Texas

Attorneys for Petitioner

[fol. 329] IN THE SUPREME COURT OF THE STATE OF TEXAS

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—APRIL 25, 1956

This day came on to be heard petitioner's *motion for rehearing of application for writ of error* and after due consideration of same by the Court, it is ordered that said motion be, and same is hereby, *overruled.*

[fol. 330] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 199

EARL R. DEEN, Petitioner,

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY

ORDER ALLOWING CERTIORARI—FILED OCTOBER 8, 1956

The petition herein for a writ of certiorari to the Court of Civil Appeals of the State of Texas, Eleventh Supreme Judicial District, is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the

Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

EARL R. DEEN,

Petitioner,

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT EASTLAND, TEXAS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Earl R. Deen, of Brown County, Texas, petitioner herein, prays that a writ of certiorari be issued to review the final decree of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, reversing the judgment of a trial court based on findings of fact made by a jury in a Federal Employers' Liability Act case in favor of him, an injured railway employee, and rendering judg-

ment that Deen recover nothing against his employer, Gulf, Colorado and Santa Fe Railway Company (Tr. 75).

I. STATEMENT OF THE MATTER INVOLVED

1. The Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas at Eastland denied petitioner his right of trial by jury guaranteed by the Constitution and given him by Congress under the Federal Employers' Liability Act (45 U. S. C. A., sec. 51 et seq.) by disregarding all findings of the jury on conflicting evidence favorable to the injured employee, giving full force and effect to all findings of the jury favorable to the railway company, and reading into the verdict a finding that was not made *(275 S. W. 2d 529)*. The Supreme Court of Texas refused an application for writ of error for want of merit, June 29, 1955 (certified copy of order appears in the record), and motion for rehearing of application was overruled April 25, 1956 (certified copy of order in the record). The Court of Appeals is thus the highest court of a state in which a decision could be had within the meaning of 28 U. S. C. A., sec. 1257, as construed by the Honorable Supreme Court of the United States, in

Michigan-Wisconsin Pipe Line Co. v. Calvert, U. S. Tex., 74 S. Ct. 396, 347 U. S. 157, 98 L. Ed. 583, rehearing denied;

Panhandle Eastern Pipe Line Co. v. Calvert, 74 S. Ct. 528, 347 U. S. 931, 98 L. Ed. 1083;

Michigan-Wisconsin Pipe Line Co. v. Calvert, 74 S. Ct. 528, 347 U. S. 931, 98 L. Ed. 1083;

Adam v. Saenger, Tex., 58 S. Ct. 28, 302 U. S. 668, 82 L. Ed. 515, gr'g certiorari 101 S. W. 2d 1046, rev. 58 S. Ct. 454, 303 U. S. 59, 82 L. Ed. 649, rehearing denied 58 S. Ct. 640, 303 U. S. 666, 82 L. Ed. 1123, conformed to 119 S. W. 2d 687, certiorari denied Saenger v. Adam, 59 S. Ct. 832, 307 U. S. 628, 83 L. Ed. 1511;

Adam v. Saenger, Tex., 58 S. Ct. 454, 303 U. S. 59, 82 L. Ed. 649, rehearing denied 58 S. Ct. 640, 303 U. S. 666, 82 L. Ed. 1123, conformed to Civ. App. 119 S. W. 2d 687, certiorari denied Saenger v. Adam, 59 S. Ct. 832, 307 U. S. 628, 83 L. Ed. 1511;

Adam v. Saenger, Tex., 58 S. Ct. 640, 303 U. S. 666, 82 L. Ed. 1123, den'g rehearing 58 S. Ct. 454, 303 U. S. 59, 82 L. Ed. 649, rev. 101 S. W. 2d 1046, cert. gr. 58 S. Ct. 28, 302 U. S. 668, 82 L. Ed. 515, conformed to 119 S. W. 2d 687, cert. den. Saenger v. Adam, 59 S. Ct. 832, 307 U. S. 628, 83 L. Ed. 1511.

2. Petitioner, Earl Deen, worked as a coppersmith in the shops of the Santa Fe Railway at Brownwood, Texas (S. F. 4). He had worked as a coppersmith about eleven years prior to July 12, 1949 (S. F. 4), on which day he sustained an injury in the course of his employment (S .F. 4). On that day a locomotive was in the shops for repair (S. F. 6).

The assistant foreman, Mr. Williams, told him, "I have got to have this engine today" (S. F. 7). Babbitt, an alloy of antimony, copper and tin, was necessary for these repairs (S. F. 10). The babbitt available was in a cracked pot on the furnace that leaked so badly the molten metal would put out the fire underneath (S. F. 10). Shortly after the assistant foreman, Williams, told Dean the locomotive had to be out that day, W. J. Bettis, clerk to the general foreman, Johnson, told Deen in the presence of Mr. Johnson that his new babbitt pot had arrived at the freight depot, that men from the store department had gone for it and if he had the old one off the furnace the men on arrival could assist him with the new one (S. F. 8, 96). The old pot weighed 250 pounds and contained solidified babbitt weighing 650 to 700 pounds (S. F. 14). Deen attempted to get the old pot off the furnace alone and to get the babbitt out of the old pot so that he would have everything ready for the new pot and be ready to do his part in melting the babbitt for use on the engine as soon as possible (S. F. 9, 65). A crane on a pole affixed to the concrete floor with a hoist was right beside the furnace for lifting heavy objects (S. F. 8). The 250-pound steel pot, about a yard long, ⅔ of a yard wide, and ⅓ of a yard deep (S. F. 12), containing 650 to 700 pounds of babbitt, a total weight of almost half a ton, fitted so snugly in the furnace that it was necessary to pry its 1½ to 2-inch rim (S. F. 15) off the brick furnace a height of about an inch (S. F .9) so as to allow the arms of the crane to grip it and lift it from the furnace (S. F. 9). A buggy bar or pinch bar was used by Deen to pry the

pot and babbitt off the furnace so it could be gripped by an available crane (S. F. 9). Deen did this work alone and in the process the pot and babbitt crashed to the concrete floor (S. F. 9). Chance thus selected the spot on the floor where the heavy pot, with its heavier contents, was placed, although Deen testified it dropped just about where he would have set it down (S. F. 58). It fell upright and Deen decided that since babbitt on cooling contracts more than steel, if he could turn the pot over, the babbitt would fall out and be available for the new pot on its briefly anticipated arrival (S. F. 75). He struggled alone to overturn the pot but was unsuccessful (S. F. 14). Earl Snow, a fellow employee, working as an acting blacksmith in the shop nearby, saw Deen's struggle and voluntarily came to his aid (S. F. 15). The two tried to overturn the pot away from them but were not strong enough to do so (S. F. 15). Deen braced himself on the furnace (which was crowded close to the pot) and Snow on the work bench and, by pulling the pot towards them, they were able to raise it slowly to an upright position (S. F. 15), when the babbitt sloughed out of the pot (S. F. 16) very fast (S. F. 126). The babbitt struck the right leg of Deen (S. F. 16), crippling him for life (S. F. 44). The customary method of handling the extraction of solidified babbitt from the steel pot had been to lift the pot and the babbitt off the furnace with the crane, as Deen did, place it on the floor, release the arms of the crane, get five or six men to come and turn the pot over manually, empty out the contracted babbitt, and then again attach the arms of the crane and hoist the

pot back on the furnace (S. F. 62, 75). The gist of the lawsuit, in the opinion of the petitioner, is this: Did the railway company, having provided a crane and hoist for lifting on and off a brick furnace a heavy steel pot, with contents, weighing about half a ton, which in size was a little larger than an army foot-locker, owe a duty to equip the pot with a clamping device so that it could be gripped by the arms of the crane and overturned on the concrete floor so as to empty out its contents, where fellow employees were available to assist in manually overturning the pot? In the opinion of the petitioner, issues of fact are involved here and those issues were correctly submitted to the jury by the trial court. Some issues were answered favorably to petitioner, some favorably to respondent.

The findings of the jury may be summarized as follows:

(1) that the railroad did not furnish Deen proper tools and this was a proximate cause of his injuries;

(2) that the railroad did not fail to furnish one or more additional men other than Snow to assist plaintiff in removing babbitt from the melting pot;

(3) that the railroad did not fail to give to plaintiff proper supervision at the time and on the occasion in question;

(4) that Deen was negligent in failing to obtain additional help and this was a proximate cause of his injuries;

(5) that Deen was not negligent in the manner and method that he used in doing the work;

(6) that the railway company could reasonably anticipate that Deen would do the job in the way and manner that he did;

(7) that the sole proximate cause of plaintiff's injuries was not due to his own acts and conduct;

(8) that $39,000 will reasonably compensate the plaintiffs for his injuries; and

(9) that plaintiff's own negligence should reduce the recovery $17,550, or 45% (Tr. 60-67).

3. The trial court reconciled the findings of the jury and rendered judgment that the plaintiff recover judgment in the sum of $21,450.00 with interest thereon at the rate of 6% per annum from April 26, 1954, and all costs of court, which is the only judgment that could be rendered without disregarding any of the findings of the jury (Tr. 85). The Texas Court of Civil Appeals set aside the verdict of the jury and the judgment rendered thereon, and rendered judgment that the plaintiff recover nothing *(Opinion, Gulf, Colorado & Santa Fe Railway Company v. Earl R. Deen, 275 S. W. 2d 529*, copy of which is hereto appended.)

4. Petitioner contends that in reaching this result, the Texas Court ruled contrary to the principles of law announced by this Court in

Bailey v. Central Vermont R. Co., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444;

Ellis v. Union Pacific RR. Co., 329 U. S. 649, 67 S. Ct. 598;

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A. L. R. 967;

Tiller v. Atlantic Coast Line R. Co., 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465;

Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520;

Pauly v. McCarthy, et al., 329 U. S. 698, 67 S. Ct. 102, 91 L. Ed. 609, 330 U. S. 802, 67 S. Ct. 962, 91 L. Ed. 1261 reversing Pauly v. McCarthy, et al., 166 P. 2d 501;

Blair v. Baltimore & Ohio R. Co., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490;

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 692;

Jesionowsky v. Boston & Maine R. R., 329 U. S. 452, 67 S. Ct. 401;

Anderson, Administratrix of the Estate of L. C. Bristow, Dec. v. The Atchison, Topeka and Santa Fe Ry. Co., Cal., 68 S. Ct. 854, 333 U. S. 821, 92 L. Ed. 1108;

Boston & Maine R. R. v. Meech, 156 F. 2d 109 (1 C. C. A. 1946, Cert. Den. October 28, 1946), 329 U. S. 763, 67 S. Ct. 124;

Cogswell v. Chicago & Eastern Ill. RR. Co., 328 U. S. 820, 66 S. Ct. 1122, 90 L. Ed. 945 reversing Cogswell v. Chicago & E. I. Rr. Co. (C. C. A. 7th), 153 F. 2d 94.

II. JURISDICTION

1. Jurisdiction to grant this Petition is sustained by Title 28 U. S. C. A., section 1257, sub-section (3). (June 25, 1948, c. 646, 62 Stat. 929.)

2. The Statutes of the United States applied by the Court of Civil Appeals of Texas are 45 U. S. C. A., Sections 51-59 (35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404).

3. The judgment of the Court of Civil Appeals of Texas was rendered February 4, 1955, rehearing denied February 25, 1955, as shown by the opinion reported in *275 S. W. 2d 529*, copy of which is hereto appended.

4. As shown above, the Court of Civil Appeals is the highest court of the state in which a decision could be had within the meaning of 28 U. S. C. A., section 1257. Application for writ of error to the Supreme Court of Texas was refused, no reversible error, June 29, 1955, and motion for rehearing of application was overruled April 25, 1956. (Certified copies of both orders are included in the transcript which accompanies this application.)

III. QUESTION PRESENTED

The question presented is whether the Court of Civil Appeals of Texas in sustaining all issues of a jury in favor of the railway and disregarding all issues found by a jury in favor of the injured employee, and by reading into a verdict something that is not there, and in setting aside a judgment of a trial court rendered in favor of the injured employee on the verdict of the jury, has deprived the in-

jured employee of the right of trial by jury given him under a Federal Statute generally known as the Federal Employers' Liability Act.

IV. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The jury found in favor of Deen:

1. the railroad did not furnish Deen proper tools and this was a proximate cause of his injuries;

2. Deen was not negligent in the manner and method that he used in doing the work;

3. the railway company could reasonably anticipate that Deen would do the job in the way and manner that he did;

4. that the sole proximate cause of plaintiff's injuries was not due to his own acts and conduct;

5. that $39,000 will reasonably compensate the plaintiff for his injuries; and

6. plaintiff's own negligence should reduce the recovery $17,500, or 45%. (Tr. 60-67.)

The evidence was conflicting on all these issues. The jury weighed the evidence and decided against the railway company on these issues, and the trial court accepted the verdict and rendered judgment in favor of the plaintiff. The Court of Civil Appeals found there was no evidence to support the above verdict and set the verdict of the jury and the judgment of the trial court aside.

The jury also found:

1. the railroad did not fail to furnish one or more additional men other than Snow to assist plaintiff in removing the babbitt from the melting pot;
2. the railroad did not fail to give plaintiff proper supervision at the time and on the occasion in question; and
3. Deen was negligent in failing to obtain additional help, and this was a proximate cause of his injuries.

The evidence was conflicting on all these issues. The jury weighed the evidence and decided against Deen, the injured employee, on these issues, and the trial court accepted the verdict and took the above issues into consideration in reducing the amount of damages Deen sustained in the course of his employment and in rendering judgment for the reduced amount in accordance with the verdict of the jury. The Court of Civil Appeals found ample evidence in the record to support these findings of the jury in favor of the railroad company. Isn't it remarkable that the jury in this case properly weighed the evidence when it made findings in favor of the railway company but improperly weighed the evidence when it made findings in favor of the injured employee? It is submitted that the Court of Civil Appeals, in disregarding all findings of the jury in favor of the injured employee, and in giving full force and credit to all findings of the jury favorable to the railway company, and in reading into the verdict something that was not there, has deprived the petitioner of his right of trial by jury given him by the Congress under the Federal Employers' Liability Act.

V. ARGUMENT AMPLIFYING REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

On page 5 of this Application, petitioner has described the method used by the railway company in lifting a 250-pound steel pot containing 650 to 700 pounds of babbitt from a furnace. It was petitioner's position in the trial and the appellate court that the pot should be so equipped with clamps that it could be gripped by the arms of an available crane which was used to lift it off the furnace so that it could be overturned on the floor and its contents emptied (S. F. 5). The petitioner, who worked with the pot day in and day out, said this should have been done (S. F. 100). Earl Snow, a fellow employee and acting blacksmith, testified the pot was not equipped to be handled with the hoist (S. F. 116). He testified I-bolts could be fixed in the pot to fasten the hoist to and that he could have made such attachments in the blacksmith shop (S. F. 116). Deen, the petitioner, testified that if the crane could have gripped the pot, he could have tilted the pot and contents over with one finger and that he could have tilted the pot away from him so that the babbitt would have fallen on the floor and not on him (S. F. 88). In lifting the pot and contents with the crane from the furnace, it had slipped and fallen from the hoist (S. F .9). The foreman and assistant foreman, on a number of times, knew the pot was being lifted off the furnace and the contents emptied, and they had not made any attempt, or said anything about making a tool to handle it (S. F. 89). On the day of the injury, July 12, 1949 (S. F. 4), a locomotive was in the shops for repair

(S. F. 6). The assistant foreman, Mr. Williams, told Deen, "I have got to have this engine today" (S. F. 7). Babbitt, an alloy of antimony, copper and tin, was necessary for these repairs (S. F. 10). The babbitt available was in the steel pot on the furnace (S. F. 10). Shortly after the assistant foreman, Williams, told Deen the locomotive had to be out that day, W. J. Bettis, clerk to the general foreman, Johnson, told Deen, in the presence of Mr. Johnson, that his new babbitt pot had arrived at the freight depot, that men from the store department had gone for it and if he had the old one off the furnace, the men on arrival could assist with the new one (S. F. 8, 96).

The railway company offered no evidence at all.

The trial court considered the above evidence and other evidence in the record sufficient to raise issues of fact with respect to the negligence of the railway company's failure to furnish proper tools to the employee, particularly since the railway company offered no evidence, and the jury weighed the evidence and found: (1) the defendant failed to furnish plaintiff with proper tools to remove the babbitt from the melting pot; (2) that such failure was negligence, and (3) that such failure was a proximate cause of plaintiff's injuries (Tr. 75, 76). On such findings of negligence, the trial court rendered judgment for the plaintiff, after reducing the amount of the recovery on account of plaintiff's negligence because of other findings of the jury as is provided in the Federal Employers' Liability Act (Tr. 81).

Texas Courts have emphasized the point over a long period of years that when the proof tends to establish a certain fact and establishes that it is within the power of the opposing party to disprove it, if false, the silence of the opposing party has a certain probative force.

Pullman Palace Car Co. v. Nelson
(Court of Civil Appeals of Texas),
54 S. W. 624—

> "When the proof tends to establish a fact, and at the same discloses that it is within the power and to the interest of the opposing party to disprove it, if false, the silence of the opposing party not only strengthens the probative force of the affirmative proof, but of itself is clothed with a certain probative force."

The same rule was applied in a suit under the Federal Employers' Liability Act for damages arising from the death of an employee in the course of his employment, by the Honorable Court of Appeals at Texarkana, in

Texas & Pacific Railway Co. v. Riley,
183 S. W. 2d 991, 994, writ of error refused,
certiorari denied, 65 S. Ct. 1414,
325 U. S. 873, 89 L. Ed. 891,

where the Appellate Court, in passing on the sufficiency of the evidence to support the findings of the jury, made this comment:

> "Moreover, these circumstances are materially strengthened by the failure of appellant to offer any explanation of the occurrence resulting in Riley's death which would excuse it."

That a pot with its contents weighing almost half a ton should be so equipped that it could be overturned by an available crane seems so reasonable and practical and of such common knowledge that the Court, even in the absence of any proof at all, should take judicial knowledge of the proposed method. The Court of Civil Appeals at Texarkana, in

Swann v. T. & P. Ry. Co.,
200 S. W. 1131,

says:

> "The existence of hoisting machinery which may be employed for lifting heavy weights is a matter of such common knowledge that evidence to that effect was not required."

The Court of Civil Appeals of Texas, in the *Deen* case, found there was no evidence to support the above findings of the jury, and set aside such findings and the judgment of the trial court rendered thereon. The Court of Civil Appeals not only disregarded the above findings of the jury but also disregarded other findings in favor of the plaintiff which were as follows:

> (1) that Deen was not negligent in the manner and method that he used in doing the work;
>
> (2) that the railway company could reasonably anticipate that Deen would do the job in the way and manner that he did;
>
> (3) that the sole proximate cause of plaintiff's injuries was not due to his own acts and conduct;

(4) that $39,000 will reasonably compensate the plaintiff for his injuries, and

(5) that plaintiff's own negligence should reduce the recovery $17,500, or 45% (Tr. 60-67).

To get around the verdict of the jury as above reported, the Court of Civil Appeals resorted to certain devices:

(1) Instead of construing plaintiff's pleadings liberally and so as to uphold the verdict of the jury, it seized upon certain clauses in plaintiff's pleading to hold that under the pleading of the plaintiff, the plaintiff must prove that the railway furnished neither adequate tools nor sufficient help to do the work, and since the jury found sufficient help was available, the plaintiff had failed to prove his case (275 S. W. 2d 529, 536). Among other things, plaintiff pled the injuries herein set forth resulting to the plaintiff were the direct and proximate result, jointly and severally, of the negligent acts of the defendant in the following particulars:

"A. .....

B. .....

C. That the defendant was negligent in not furnishing plaintiff with proper tools, as herein described, to remove said babbitt;

D. That defendant was negligent in not furnishing at least two additional men to assist plaintiff in removing the babbitt from said pot." (Tr. 7.)

Petitioner states a fair construction of his pleading does not warrant the construction of the appellate court that since plaintiff pled inadequate tools and the non-availability of additional help as alternate causes of plaintiff's injuries, plaintiff must prove both causes in order to succeed; plaintiff's pleading as a

whole show allegations of several acts of negligence; contrary to the finding of the appellate court, the case was not submitted to the jury on the basis that plaintiff must prove two acts of negligence to prevail.

(2) The appellate court found each finding of the jury in favor of the railway company amply supported by the evidence, while each finding of the jury in favor of the injured employee had no evidence to support it;

(3) The appellate court read into the verdict of the jury a finding that was not there, to-wit: that the railway company had provided Deen a safe method to do his work and was under no duty to provide him more than one safe method. The jury did find (a) the railroad did not fail to furnish one or more additional men, other than Snow, to assist plaintiff in removing the babbitt from the meling pot, and (b) that Deen was negligent in failing to obtain additional help, and this was a proximate cause of his injuries (Tr. 60-67).

The jury was not asked and was not given an opportunity to find whether with additional help Deen could have done his work safely. Indeed, it was the contention of the railway company in the trial court that the accident would have happened anyway despite the number of helpers present. The cross-examination of Deen by the railway attorney developed the following evidence:

> "Q. And the strain in getting it (the melting pot) up was over before it (the babbitt) fell on your foot?
>
> "A. (Deen) Yes, sir.
>
> "Q. As a matter of fact, these extra men would have been helpful to you only in getting it upright; is that right, Mr. Deen?
>
> "A. Yes, sir.

"Q. And whether there had been five or ten men there would not have had anything to do with the babbitt falling out of the pot?

"A. No, sir.

"Q. It would have fallen out if the whole shop had been there with you?

"A. It might have fell on two of us." (S. F. 77.)

In its Motion for an Instructed Verdict, respondent urged "it is undisputed that as far as the accident itself is concerned, additional employees could not and would not have prevented this happening." (Paragraph V, Defendant's Motion for an Instructed Verdict, Tr. 23.) In his objections to the court's charge the defendant again advances his theory that the absence of additional men had nothing to do with the accident:

> "Defendant objections (objects) and excepts to special issue No. 6 for the reason that under the undisputed evidence the failure to furnish one or more additional men was not and could not be a proximate cause of plaintiff's injuries." (Paragraph VIII, Defendant's Objections to the Court's Charge, Tr. 35.)

The appellate court in its construction of the evidence is more favorable to the railway company than the railway company is to itself. Isn't it a travesty on justice that Deen is told by the appellate court to limp through life without any compensation because of a fact that the railway company says had nothing to do with the accident?

(4) The strictness with which the appellate court construed plaintiff's pleading in order to reach the conclusion that plaintiff assumed the burden of proving both inadequate tools and inadequate help is equalled only by the liberality of the appellate court in construing the railway company's pleadings in or-

der to attempt to justify a judgment for the railway company. As pointed out above, at no time did the railway company contend that the failure of the plaintiff to use available help was the proximate cause of plaintiff's injuries. The defendant pled the failure of the plaintiff to obtain additional help constituted contributory negligence: "* * * that the plaintiff did not ask for additional help * * * and that if there was any negligence in the method used * * * or the amount of help used * * * it was the plaintiff's negligence and proximately contributed to his alleged injuries." (Tr. 10-11.) That is a plea of contributory negligence. The jury reduced the amount of the plaintiff's recovery 45% or $17,500 because of the contributory negligence of the plaintiff (Tr. 60-67). The railway company by its pleadings and evidence did not contend that plaintiff's failure to use available help was the sole proximate cause of his injuries. In fact, after the trial court had prepared issues bearing on plaintiff's failure to use additional help, at the request of the railway company, the court submitted an issue to the jury as to whether the sole proximate cause of plaintiff's injuries was not due to his own acts and misconduct, to which the jury answered: "It was not the sole proximate cause of his injuries." (Tr. 65.) The defendant pled the failure of Deen to use available help was contributory negligence, the jury found that such failure was negligence on the part of Deen but showed it considered such negligence as contributory by reducing the amount of the recovery and by finding that such negligence was not the sole proximate cause of the accident. The Court of Civil Appeals ignored the finding of the jury on the sole proximate cause issue, ignored the verdict of the jury reducing plaintiff's recovery because of his own negligence, and construed plaintiff's negligence in failing to obtain additional help as the sole proximate cause of his injuries—despite the fact that defendant only pled plaintiff's failure to use available help as contributory negligence.

Even if the jury's findings amount to a finding that with available help Deen could have done the job safely, which they do not, nevertheless the plaintiff was entitled to judgment. This very question was before the Supreme Court of the United States, in

> Clyde Wilkerson v. Wilson McCarthy and Henry Swan, as Trustees of Denver & Rio Grande Western R. Co., 93 L. Ed. 497, 336 U. S. 53.

In this case the employee of the railroad was injured by a fall while walking over a pit on a narrow plank which he contended was not firmly set and was oily. The railroad admitted the accident occurred in the manner stated but denied negligence. The evidence showed that the company had not forbidden its employees to use the plank but had put chains on posts around it. One narrow place was left where an employee could squeeze through and use the plank. The trial court instructed a verdict for the defendant and this was affirmed by the Supreme Court of Utah. The court held the posts and chains were the equivalent of an order not to use the plank. The Supreme Court of the United States granted a writ of certiorari and reversed the case. In its opinion the Supreme Court again reiterated that courts must not deprive the employee of the right of trial by jury in these cases and in the course of its opinion said:

> "While this left only a very narrow conflict in the evidence, it was for the jury, not the court, to resolve the conflict."

The court continues:

> "There was, as the state court pointed out, evidence to show that petitioner could have taken a slightly longer route and walked around the pit, thus avoiding the use of the board. This fact, however, under the terms of the Federal Employers' Liability Act, would not completely immunize the respondents from liability if the injury was

> 'in part' the result of respondents' negligence. For while petitioner's failure to use a safe method of crossing might be found by the jury to be contributory negligence, the Act provides that 'contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee'."

The same point was before the United States Court of Appeals, 4th Circuit, in

Va. Ry. Co. v. Viars, 193 F. 2d 547.

Here the railway employee was electrocuted while exploding dynamite. The court said:

> "It is said, also, that because the plaintiff might have used a fuse with the dynamite, instead of the electric equipment, or might have used picks and shovels without dynamite, even though it might have taken longer, he elected to use a dangerous rather than a safe method of doing his work and is thereby precluded from recovery. There was evidence, however, that the use of fuses in exploding the dynamite was more dangerous than the use of electrical equipment; and, on the evidence of plaintiff, the picks and shovels had been tried without success. If, however, plaintiff adopted a dangerous way of doing the work, when a safe one was open to him, this amounted to nothing more than assumption of risk or contributory negligence, neither of which excuses defendant's negligence or bars recovery under the Federal Employers' Liability Act. Tiller v. Atlantic Coast Line Ry. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610; Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497. If plaintiff was guilty of negligence in using the dynamite, this did not bar him of recovery, if defendant was also guilty of negligence which contributed

> to his injury but went merely to the reduction of damages. This aspect of the case was fairly presented by the trial judge in his charge to the jury."

Petitioner submits the Supreme Court's holding in the *Wilkerson* case, supra, is controlling even if the jury's findings are given the forced and unreasonable construction that they amount to findings the railway provided the plaintiff a safe method of doing his work.

The decisions of the Honorable Supreme Court of the United States insisting that verdicts of jury be not taken away from employees in cases arising under the Federal Employers' Liability Act (45 U. S. C. A. 52) by appellate courts have not received a friendly reception in Texas. The Honorable Court of Civil Appeals in this case made no reference to any of the numerous decisions of the Supreme Court of the United States dealing with the right of trial by jury in Federal Employers' Liability cases. If Texas appellate courts can get around an Act of Congress giving an injured employee a jury trial and the numerous decisions of the Supreme Court of the United States liberally construing this right in favor of the injured workman by such devices as (1) saying there is no evidence to support any findings in favor of the injured employee but ample evidence to support all findings in favor of the railway company; (2) by reading into jury verdicts something that is not there, and (3) by strictly construing pleadings against the injured employee, while liberally construing pleadings in favor of the railway company, then the Act of Congress and the numerous decisions of the Supreme Court

of the United States amount to nothing so far as injured employees in Texas are concerned. The Supreme Court of Texas refused a writ of error in this case and wrote no opinion in this case. In the case of *Port Terminal Railroad Association v. Oliver Ross, 289 S. W. 2d 220*, the Supreme Court of Texas referred to the *Deen* case and supported the action of the Court of Civil Appeals at Eastland, Texas, in circumventing the verdict of the jury, and encouraged all appellate courts in Texas to disregard the decisions of the United States Supreme Court in Federal Employers' Liability cases in these words:

> "The petitioner in the Deen case argues, as does the plaintiff in the present case, that under the Federal Employers' Liability Act as interpreted and applied by the Supreme Court of the United States, the question of the carrier's negligence is for the jury, and that the trial or appellate court cannot substitute its judgment for that of the jury. The opinion in Bailey v. Central Vermont Railway, Inc., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, states that a railroad employee will be deprived of a goodly portion of the relief which Congress has afforded him if he is denied a jury trial in a close or doubtful case. And it has been stated that the Supreme Court of the United States is paying lip service to the doctrine that liability in these cases is based only upon fault, but that its standard of fault is such as to indicate that the principle is without much practical meaning. See dissenting opinion of Mr. Justice Jackson in Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497.
>
> "In an action under the Federal Employers' Liability Act, the question of what constitutes negligence, and the sufficiency of the evidence to raise that question for the jury, is to be determined by the applicable

federal decisions. The decisions of the Supreme Court which are cited by the parties represent only that Court's appraisal of the facts there involved, and are of little assistance in the determination of cases which are not factually analogous. So long as that Court continues to pay even lip service to the principle that liability of the railroad employer is based only upon negligence, it is incumbent upon the state courts to recognize and apply the principle in cases presented for their determination. Until required to do so by a clear and positive declaration of the highest federal tribunal, our trial and appellate courts cannot and should not give effect to a jury finding of negligence when in its opinion the record is completely devoid of evidence in support of same."

Petition for writ of error in the *Deen* case was filed in the Supreme Court of Texas, March 28, 1955. It was finally overruled April 25, 1956. It took the Supreme Court of Texas one year and one month to decide that the record was completely devoid of any evidence to support any findings of the jury in favor of Deen. In 1928, in a case not arising under the Federal Employers' Liability Act, styled *Galveston H. & S. A. Ry. Co. v. Brewer, 4 S. W. 2d 320*, the Supreme Court of Texas expressed its approval of a decision by the Court of Civil Appeals, by denying a writ of error, upholding a jury verdict in a Master and Servant case where the evidence was strikingly similar to the evidence in the *Deen* case. That case also involved an injured railway employee. That injured intrastate railway employee, in 1928, received more liberal treatment from the appellate courts in Texas than Deen received in 1956, despite the liberal amendments to the Federal Employers'

Liability Act and despite the liberal construction of that Act by the Honorable Supreme Court of the United States.

VI. CONCLUSION

It is respectfully submitted that the opinion of the Court of Civil Appeals of Texas, in this case, is in conflict with express provisions of the Federal Employers' Liability Act and controlling decisions of this Court construing that Act; that a Writ of Certiorari should be granted in order for this Court to review the record and the opinion of the Court of Civil Appeals of Texas, and finally reverse that judgment and render judgment in favor of petitioner and in accordance with the verdict of the jury, and petitioner prays for such other and further relief, general and special, at law and in equity, to which he may be justly entitled.

Respectfully submitted,

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June 23, 1956

I certify that a copy of the foregoing petition for writ of certiorari has been mailed, on the 23rd day of June, 1956, to the respondent's attorneys, as follows: to Messrs. Wigley, McLeod, Mills and Shirley, Attorneys at Law, Union Station Building, Galveston, Texas; to Messrs. Woodruff and Holloway, Attorneys at Law, First National Bank Building, Brownwood, Texas, and to Messrs. Hudson, Keltner and Sarsgard, Attorneys at Law, 1313 Continental Life Building, Fort Worth 2, Texas.

.....

ROBERT LEE GUTHRIE.

APPENDIX

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Appellant,

v.

Earl R. DEEN, Appellee.

No. 3135.

Court of Civil Appeals of Texas.

Eastland.

Feb. 4, 1955.

Rehearing Denied Feb. 25, 1955.

Employee's action against railroad under Federal Employers' Liability Act for personal injuries inflicted by falling babbitt. The District Court, Brown County, A. O. Newman, J., gave judgment for employee. Railroad appealed. The Court of Civil Appeals, Grissom, C. J., held that where employee admitted that if he had obtained additional assistance babbitt pot could have been emptied safely, and jury found employee negligent in not obtaining additional assistance, employee could not recover.

Judgment reversed and rendered for railroad.

1. Master and Servant—Key No. 104

If babbitt that fell and injured employee could have been emptied from babbitt pot safely if employee had obtained additional men to help him, railroad had furnished one reasonably safe way to empty pot, and had no duty to furnish a second reasonably safe way by supplying employee proper tools for the job. Federal Employers' Liability Act, § 3, 45 U. S. C. A. § 53.

2. Master and Servant—Key No. 236(4)

Where employee injured by falling babbitt admitted that if he had obtained additional assistance babbitt pot could have been emptied safely, and jury found employee negligent in not obtaining additional assistance, employee could not recover, even if railroad was guilty of negligence in failing to furnish proper tools so employee could do work alone.

3. Appeal and Error—Key No. 1175(5)

Exceptions to rule providing for rendition of judgment by appellate court on reversal were not applicable, in employee's action for personal injuries under Federal Employers' Liability Act, to record, which disclosed that employee alone was guilty of negligence, and the Court of Civil Appeals on reversal rendered judgment trial court should have rendered. Rules of Civil Procedure, rule 434.

Woodruff & Holloway, Brownwood, Hudson, Keltner & Sarsgard, Ft. Worth, for appellant.

McCord, Durant & Witts, Robert Lee Guthrie, Dallas, for appellee.

GRISSOM, Chief Justice.

On July 12, 1949, Earl R. Deen had his leg broken by babbitt falling from a melting pot and he sued his employer, the Gulf, Colorado & Santa Fe Railway Company, for damages under the Federal Employers' Liability Act. See 45 U. S. C. A. § 53. Deen had then been employed by said company as a coppersmith in its roundhouse in Brownwood for eleven years. The company kept there a babbitt melting pot which had cracked and was no longer usable. The railway company had ordered a new pot. On the morning of July 12th, Deen's foreman advised him there was an engine in the roundhouse which had to be repaired that day. Deen was working on said engine when the clerk of said company's store department told him the new pot was on the way to the roundhouse from the depot. Deen left the engine, moved the old pot to the floor and was attempting alone to dump the babbitt out of the pot when a blacksmith, Snow, saw Deen and volunteered to help. Snow and Deen tried to dump the pot "away" from them but it was too heavy to tilt the pot forward without more help and they then pulled the pot toward them and the babbitt fell forward from the pot and broke Deen's leg. Deen did not ask for any help. Three times within the preceding [530] three weeks, Deen, with the assistance of sufficient help, had manually re-

moved the babbitt without anyone being injured. There were about sixty other men employed in Deen's department of the railway shop. His employers were not advised that he was then going to do such work, nor how he proposed to do it, but Deen voluntarily attempted to do it alone and then, after Snow volunteered, he proceeded to remove the babbitt with only the assistance of Snow.

Deen alleged it was necessary, if said engine was to be repaired that day, that there be no delay in installing the new melting pot and that it was his duty to get the old pot off the furnace and remove the babbitt; that he moved the pot from the furnace to the floor; that the pot weighed about 250 pounds and the babbitt and pot together weighed about 800 pounds; that to get the babbitt out of the pot it was necessary to raise the pot on its edge so the babbitt would fall out; that the railway company knew, or should have known, that the old pot had to be moved and the babbitt taken out and, therefore, it was its duty to furnish Deen with proper tools with which to take the babbitt out of the old pot, or to furnish "*sufficient help to remove such babbitt without the use of tools*"; that Deen knew the babbitt could not be removed without tools to grasp the pot and give sufficient leverage to turn the pot over, or "*that he have sufficient help to tip the edge of said pot over and turn the same in the direction away from the plaintiff*"; that plaintiff procured the help of one man, Snow, to turn said pot over and dump the babbitt; that they attempted to turn the pot over by raising it on its edge and tilting it "*away from them*" but, because of its weight, they could

not do so; "*that because of the lack of sufficient help or sufficient tools*, it then became necessary for the plaintiff and the said Snow to grasp said pot upon its edge and pull same *towards them* in order to turn the same over"; that when they tilted the pot toward them the babbitt fell toward Deen and struck his leg. "*That had the plaintiff had sufficient help, to-wit: at least two other persons, to assist in turning said pot over, the same could have been done by lifting the same and turning it over away from the said plaintiff and the said Snow, but because of the negligence of the defendant in failing to furnish sufficient help or sufficient tools*" Deen was injured. (Emphasis ours.) Defendant answered, among other things, that Deen decided when and how this should be done and that he acted without instruction as to how it should be done; that Deen did not ask for additional help nor for instructions; that the method used was decided by Deen alone and, if there was negligence in the amount of help used or the manner in which the work was done, said matters were determined solely by Deen and his injury was the result of his own negligence.

A jury found (1) the railway company failed to furnish Deen with proper tools to remove the babbitt and (2) that such failure was negligence and (3) a proximate cause of Deen's injury; that (4) defendant did not fail to furnish one or more men, in addition to Snow, to assist Deen in removing the babbitt from the melting pot; and (7) the railway company did not fail to give Deen proper supervision; that (10) Deen was negligent in failing to obtain

additional help to do the work he was doing when he was injured and that (11) Deen's said negligence was a proximate cause of his injury. The jury found that (13) Deen was not negligent in the manner and method used in doing the work; that (15) the railway company and its supervisory employees should have reasonably anticipated that Deen would perform the work which caused his injuries in the way and manner in which he did; that (16) the sole proximate cause of Deen's injury was not "due to" his acts and conduct; that (17) $39,000 would compensate Deen for his injuries but that (18) said amount should be reduced 45%, or $17,550, by reason of Deen's negligence. Judgment was rendered on said verdict awarding Deen $21,450 and the railway company has appealed.

The principal question presented is whether there was evidence to sustain the finding that the railway company was [531] negligent in failing to furnish Deen with tools to remove the babbitt from the melting pot. Deen was furnished a revolving hoist and chains with hooks which he used to move the melting pot from the furnace to the concrete floor. His injury was caused by the falling of the babbitt from the pot while he and Snow were trying to get the babbitt out by tilting the pot "toward" them, instead of "away from" them, after the pot had been moved from the furnace to the floor. Appellant contends it had no duty to furnish more than one reasonably safe way to do the job; that the babbitt could have been removed with reasonable safety by the use of the additional help available and that the jury's findings and the undisputed evidence so show.

The melting pot was described by Deen as being about nine to ten inches deep, forty inches long and twenty-two inches wide. It was slightly wider at the top than the bottom. It resembled a kitchen sink. The pot weighed about 250 pounds and it and the babbitt therein weighed about 800 pounds. The pot had an outside rim around its top 1½ to 2 inches wide.

Deen's complaint was, in substance, that it was the company's duty to do one of two things, either furnish tools or additional help to remove the babbitt. Deen seems to recognize in his pleadings the correctness of appellant's proposition that the company did not have a duty to furnish more than one reasonably safe way to do the work.

[1] We shall now attempt to determine the correctness of appellant's contention that the verdict and the undisputed evidence show that the babbitt could have been removed with reasonable safety with the additional help available to Deen. If this contention is correct, the railway company had furnished one reasonably safe way to do the job and it had no duty to furnish a second reasonably safe way, that is, to furnish Deen with tools. In other words, if there was no need for tools the railway company had no duty to furnish them. Western Union Telegraph Co. v. Coker, 146 Tex. 190, 204 S. W. 2d 977, 979; Louisville & N. R. Co. v. Davis, 6 Cir., 75 F. 2d 849; August v. Texas & N. O. R. Co., Tex. Civ. App., 265 S. W. 2d 148, 153 (RNER); Armstrong v. Missouri-Kansas-Texas R. Co. of Texas, Tex. Civ. App., 233 S. W. 2d 942, 946 (RNRE); Wolfe v. Henwood, 8 Cir., 162 F. 2d 998, 1000; Fore v.

Southern Ry. Co., 4 Cir., 178 F. 2d 349, 351; McGivern v. Northern Pac. Ry. Co., 8 Cir., 132 F. 2d 213, 217; Thomson v. Pennsylvania R. Co., 6 Cir., 88 F. 2d 148, 150; Johnson v. Pulliam, Tex. Civ. App., 161 S. W. 2d 589 (RWM).

As heretofore shown, the jury found the railway company did not fail to furnish more men to assist Deen in removing the babbitt; that it did not fail to give Deen proper supervision at the time of his injury; that Deen was negligent in failing to obtain additional help to remove the babbitt and that such negligence was a proximate cause of his injury. We think said answers, considered in connection with the record, must be construed as a finding that sufficient men were available to help Deen remove the babbitt with safety. If it does not include a finding that the babbitt could have been thus removed with reasonable safety, we need only to further determine whether the record shows that if Deen had used sufficient help the babbitt could have been manually removed with reasonable safety. It is undisputed that several times recently before Deen's injury, he, with sufficient help, had manually removed the babbitt without injury. Deen pleaded that it was the company's duty to either furnish tools or additional help and the jury found that additional help was furnished and Deen was negligent in not using it. It is shown by Deen's testimony that if the babbitt could have been emptied by turning the pot away from, instead of toward, the men doing the work it could have been manually done with safety. The record shows that with sufficient help the babbitt could have been manually removed from the pot

with reasonable safety by tilting the pot away from the men doing the work. The testimony of Deen and his witnesses are conclusive on this question. The following testimony of [532] Deen and his witnesses show the situation existing when Deen was injured and requires said conclusion. Mr. Deen testified:

> "A. Mr. Earl Snow, who was working at a blacksmith job—came over and said, 'Maybe I can give you a lift' or in some way he remarked that maybe he could help me, and I said, 'Well, lets see if we can turn it over away from us' and we tried to turn it *away from us*, but we couldn't. And I said, 'Well, maybe we can pull it *toward us*, if we can brace ourselves, you can brace there on the work bench, or work table that we have here, and I will brace on the furnace,' and so we braced ourselves, tried it and gradually came up with it; but it was very slow because we were over-powered to start with, but we managed to get it up about straight, on its side, and I wouldn't say that I did, but one of us remarked—I think that I was the one that mentioned it to look out that thing sure would mash your toe.
>
> * * * * *
>
> "Q. *Could it have been turned away from you if you had* had more man power? A. *I don't see why it couldn't.*
>
> "Q. How many additional men would you say it would take? A. How many—
>
> "Q. *How many additional men to turn that pot by lifting it away from you?* A. *One good man, anyhow.*
>
> * * * * *
>
> "Q. Now, all right, on this particular occasion, did you request any help in lifting this pot? A. No, sir.
>
> * * * * *

"Q. Well, from the time you first noticed—I am not talking about the time of your last batch, but from the time you first got it cracked until the time you got hurt, it had been some two or three weeks, had it not?

A. Yes, sir.

"Q. During that time, you and others had taken it out of there—out of the furnace, on the ground there, and taken the babbitt out, and brazed it, one or more times? A. Yes, sir.

"Q. About three times, wasn't it? A. Yes, sir.

* * * * *

"Q. Now, Earl, I will ask you if that pot, babbitt pot, and the removal of it was your job? A. Yes, sir.

"Q. And, were you a full rated man, getting the maximum rate for your job? A. Yes, sir.

"Q. In doing the work out there, I will ask if you or any full rated man was expected to know pretty well how to do the job? A. Yes, sir.

"Q. All right. As far as getting that pot out, who was in charge of that? A. I was.

"Q. Did the foreman tell you to take the pot out?

A. No, sir.

* * * * *

"Q. All right, but any way, as far as this particular job was concerned you were just told by the clerk,—Mr. Bettis, I believe it is? A. Yes, sir.

"Q. That it was—or that the new pot had come in?

A. Yes, sir.

"Q. And that they—the Store Department had gone after it in a truck? A. Yes, sir.

"Q. And nobody told you, none of the supervising employees, Williams or Johnson, or anybody else, told you how to do that job, did they? A. No, sir.

"Q. Whose responsibility was it to do the job? A. Mine.

"Q. Who decided it was going to be done at that particular time? A. I did.

"Q. Who decided as to whether you were going to do it by yourself or to go ask for help? A. I did.
[533] "Q. There were men around there that could have been found to help you, weren't there? A. I suppose they could, but I had asked so many times and they hadn't been.

* * * * *

"Q. All right, next question: 'Well, did you go and ask him for some help? Answer: 'No, sir.' Did you say that? A. I did.

"Q. Question: 'There were men working there that you could have had assigned to help you, were there not? And you answered 'Yes, sir?' A. Yes, sir.

"Q. Did you say that? A. Yes, sir.

"Q. Is that true? A. Yes, sir.

"Q. Next question: 'And you did not ask for more help?' Answer: 'Not on that particular job, no sir.' Was that your answer? A. That's right.

"Q. Next question: 'You had not discussed that particular job with the foreman at all?' Answer: 'No, sir.' Did you say that? A. Yes, sir.

"Q. And was that true? A. Yes, sir.

"Q. All right. Then 'There were some men reasonably close the foreman could have assigned to help you?' A. Yes, sir, but I don't know whether he would or not.

"Q. Anyway, you didn't ask him and have him refuse? A. No, sir.

"Q. Now, getting back to getting that pot out, I think you had taken it out about three times before in the past two or three weeks, had you not? A. Something like that.

"Q. You knew how to handle that job, didn't you, Earl? A. I thought I did.

"Q. Was there any one out there that knew more about it than you did, or who had taken it out more times than you had? A. No, sir.

* * * * *

"Q. All right; let's just take them one at a time: The decision as to when to take it out; who made that decision? A. I did.

* * * * *

"Q. All right, now, Earl, if I misquote you, please tell me; as to getting that babbitt, so far as that is concerned, you might have been able to break it with a sledge hammer or some other way, but *you figured that the safest way was to turn it over.* A. *That's right.*

"Q. All right; whose decision was that? A. I don't remember, but as well as I remember, we both talked about it.

"Q. Who talked about it? A. Me and Earl Snow.

"Q. Well, Earl, who was in charge of removing that pot and babbitt, you or Earl Snow? A. I was.

"Q. Well, anyway, *you agree that is the best way to do it, don't you Earl?* A. *Yes, sir.*

"Q. All right. Now, incidentally, after you got that old babbitt pot out, the furnace was empty where you could put the new one in it, wasn't it? A. Yes, sir.

"Q. There wasn't any hurry about getting the babbitt out of the old pot right then, was there? A. Noth-

DARK PAGE BLEE

ing more than it had to come out, if the engine was got out that day.

* * * * *

"Q. Are you telling this jury right now—if you don't know, tell me your don't know; but are you telling this jury right now there was not plenty of babbitt out there besides what was in that pot on that day?

A. I don't know that there was.

[534] "Q. Well, you don't know whether there was or wasn't, Earl, is this just about the truth, you were going to have to do it sooner or later, and you were there waiting on the truck, and you just decided to do it then? A. That's right.

"Q. All right, now, whose decision was that? A. Mine.

"Q. The foreman did not tell you to do that at that time? A. No.

* * * * *

"Q. So, turning it over is what you had done on the other occasions to get the babbitt out? A. That's right.

"Q. All right. And the pot weighed the same, didn't it? A. Yes, sir.

"Q. And the—was there ever that much babbitt in it before? A. Yes, sir.

"Q. All right. How many men did it take to turn it over the other times? A. Four or five, or five or six ahold of it; I have had as many as six ahold of it.

"Q. Did anybody know that any better than Earl Deen? A. No, sir; I don't suppose they did.

"Q. And on the other occasions, during the past two or three weeks, when you changed it out, you had as many as five or six men helping you? A. Yes, sir.

"Q. All right. Nobody refused to let them help you, did they, Mr. Deen? A. No, sir; I caught them when they was right there available, and I asked them and they helped.

* * * * *

"Q. There wasn't anything wrong with that operation out there that day, outside of your foot being in the way when that babbitt fell out? A. So far as I know.

"Q. There wasn't? A. That's right.

* * * * *

"Q. Now, Mr. Deen, with reference to lifting this pot the way that you did, you did demonstrate to the jury the way you and Mr. Snow *got in front* of it and braced yourself with one hand and *pulled it toward you?* A. Yes, sir.

"Q. Was there any other way to lift that pot and to turn it that way, that is, for two men to do it other than that way? A. *Two men was over-loaded* in doing that and we had tried before to turn it *away from us* for safety measures.

"Q. And is that why you had to get in front of it? A. That's true with only two of us were able to pull more than we was able to lift and push.

* * * * *

"Q. Question 77: But *you knew that you would get help sooner or later to get it down.* And you answered: 'Yes, sir.' Did you make that answer? A. Yes, sir.

"Q. Was that true? A. Yes, sir.

"Q. *You did know that you would get help sooner or later?* A. Yes, sir.

"Q. In other words, you knew that they were not going to let this furnace be shut down indefinitely

DARK PAGE BLE

waiting to get the new pot installed? Answer: 'They never have, but sometimes it looked like we was going to have to go to town and get help' did you answer that? A. Yes, sir.

"Q. Next question: What I am getting at is this: If you had not done it at that particular hour or minute, and let the pot go up to the warehouse, you would still have had to go through the same procedure, that is, you would still have had to take the old pot out and put the new one in, and you answered: 'Yes, sir' did you make that answer? A. Yes, sir.

"Q. Did you say that. A. I sure did.
[535] "Q. In other words, it would have meant a few minutes, or the difference would have been the delay in getting help; is that right? A. Yes, sir.

* * * * *

"Q. When I asked you about designing something, all that you could think of was the clamps and that would be dangerous, wasn't that your testimony? A. Yes, sir.

"Q. And yesterday you testified that you had moved that pot several times? A. Yes, sir.

"Q. And that you knew more about moving that pot than anybody in the shop; now, do you wish to change that? A. I don't think I said I knew more about it than anybody in the shop.

"Q. I believe you said you knew as much about it as anybody in the shop? A. Well, let it go at that.

* * * * *

"Q. Now, Mr. Deen, if you had had another man or two men more to help in lifting that pot, would your foot likely to have been in the position it was when injured? A. If I had had enough help, I would have turned it away from me."

Plaintiff's witness Snow testified:

"Q. Now, with reference to trying to move that pot and trying to empty the babbitt from it *away from you*, could three men have done that job? A. I suppose they could have, maybe.

"Q. Could four men have done it? A. Well, that might be possible, but I don't know whether four men could get to it or not, maybe they could have and maybe they couldn't.

"Q. Could three men have done the job with more ease than two men? A. Yes, sir; I suppose three men would have been better on the job.

"Q. *Could three men have turned it over away from you so the babbitt could fall out?* A. I think so.

* * * * *

"Q. All right. Now, one more question: if you or he had thought it was necessary, could you have gone to the foreman and asked for some more help there. A. Yes, sir.

"Q. Were there men available in that same general area—I don't mean men within ten feet—but men in that general area available to be assigned, or could have been assigned to help you? A. Yes, sir.

"Q. All right. And all it would have caused would have been a delay? Delay getting the job done, is that right? A. Yes, sir.

* * * * *

"Q. Now, Mr. Snow, if you had a third man, you would have been behind the pot, would you not? A. I, myself?

"Q. Yes, sir. In other words, if you had had a third man you would not have all three been in front of it, would you, Mr. Snow? A. No, sir; I wouldn't think so.

DARK PAGE BLE

"Q. Because with a third man, you could have moved it over *from you*, and dumped the babbitt out, could you not? A. Yes, sir; I think so. * * *"

Plaintiff's witness Anderson testified:

"Q. And you know, do you not, Mr. Anderson, that Mr. Deen, in the preceding couple of weeks, had taken that pot out two or three times to braze it; you know that, don't you. A. Yes, sir.

"Q. And put it back? A. Yes, sir.

"Q. And you know, do you not, that he did it with the same equipment that was out there and used on July 12, 1949, don't you? A. Yes, sir.

"Q. All right. And he had gone through exactly the same operation [536] that he had gone through on these other occasions? A. I reckon.

"Q. All right. And you also know that nobody got hurt doing it, don't you? A. Yes, sir." (Emphasis ours.)

[2] We conclude that the verdict and the undisputed evidence show that with the use of the additional help available the pot could have been tilted away from, instead of toward, the men doing the work and the babbitt thus removed with reasonable safety. The testimony of Deen and his witnesses is to that effect. It is undisputed that the babbitt had been thus safely removed three times in the two or three weeks preceding Deen's injury. Deen alleged it was defendant's duty to either furnish tools or sufficient help. His case was submitted to the jury on that theory. Deen thus assumed that if sufficient help had been furnished the babbitt could have been manually removed with safety.

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Sufficient help was available. See Western Union Telegraph Co. v. Coker, 146 Tex. 190, 204 S. W. 2d 977, 979. Under Deen's pleadings and the law, defendant was not required to do both. With sufficient help the babbitt could have been dumped manually with reasonable safety, therefore, there was no need, hence no duty, to also furnish tools. Furthermore, there is no evidence that the additional tools suggested by Deen and Snow were in use, safe or approved. They had not thought of them before the accident. Deen testified that the clamps suggested would have been dangerous. They testified that the only way the babbitt could have been safely removed was either with their suggested appliances or manually with adequate help. Deen testified the safest way was to tilt the pot and let the babbitt fall out. Deen and his witnesses agree that with sufficient help the pot could be tilted away from the men doing the work and the babbitt removed with safety. We sustain appellant's contention that the evidence does not support the finding that defendant was negligent in failing to furnish tools. The defendant was not negligent if it provided the necessary help and Deen voluntarily proceeded to do the work without using it. There were about 60 men working in his department. Deen started to do the work alone, without seeking any assistance and without instructions to do the job then or without help. Snow volunteered to, and did help. Deen had done the same job three times before, in the same way; on those occasions he asked for and obtained adequate help and no injury was suffered. Western Union Telegraph Co. v. Coker, 146 Tex. 190, 204 S. W. 2d 977,

979. Deen alleged appellant's duty was to either furnish tools or sufficient help. He was required to prove that defendant did neither. There being a reasonably safe way to dump the babbitt without tools, appellant had no duty to furnish them for that purpose. Judgment should have been rendered for appellant notwithstanding the finding that appellant was guilty of negligence in failing to furnish tools. This decision renders unnecessary a consideration of the other points presented by appellant.

[3] The exceptions stated in Texas Rules of Civil Procedure, rule 434 are not applicable to this record and we are required to render the judgment the distinguished trial court should have rendered. R. C. P. 434; London Terrace v. McAlister, 142 Tex. 608, 180 S. W. 2d 619; Yarbrough v. Booher, 141 Tex. 420, 174 S. W. 2d 47, 150 A. L. R. 1369; Lone Star Gas Co. v. Kelly, Tex. Civ. App., 166 S. W. 2d 191.

The judgment is reversed and judgment rendered for appellant."

JUL 16 1958
JOHN T. FEY, Cle

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 199

EARL R. DEEN, *Petitioner*,

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent*.

RESPONDENT'S REPLY TO PETITION FOR CERTIORARI

GULF, COLORADO AND SANTA FE RAILWAY, COMPANY, *Respondent*

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GULF, COLORADO AND SANTA FE RAILWAY, COMPANY, *Respondent*

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Gulf, Colorado and Santa Fe Railway Company, respondent herein, prays that the petition for certiorari be dismissed, or in the alternative that it be denied. Respondent denies jurisdiction and denies error, and in support of such contentions presents the following:

STATEMENT OF THE CASE

The decision of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas at Eastland, Texas, to which decision the petition for cer-

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ciorari is directed, is correctly copied in the appendix to the petition herein, and is reported as *Gulf, Colorado and Santa Fe Railway Company vs. Deen*, 275 SW (2d) 529. Respondent cannot accept as accurate the petitioner's "Statement of the Matter Involved" beginning on page 2 of the petition herein. In that portion of the brief and throughout same petitioners have misconstrued the decision, the opinion of the Court of Civil Appeals, and the basis for it. The best evidence of the decision of the Court of Civil Appeals, the basis for the decision, and the facts is the opinion of the Court of Civil Appeals, and neither the attorney for petitioner nor the attorney for the respondent can change that opinion, and we are in general willing to let the opinion of the Court of Civil Appeals "speak for itself", and therefore only make a brief summary to correct the erroneous impression which might be created by petitioner's statement.

Petitioner's repeated statements that he was deprived of a jury trial are untrue. Petitioner had the option of filing this case in the United States District Court or in the District Court of the State of Texas. He chose the State Court and filed therein a petition in accordance with the statutes and rules of procedure of the State of Texas. The defendant answered in compliance with the Texas practice. The parties amended in accordance with Texas practice, and announced ready and tried the case before a jury. Under Texas practice civil suits are tried before juries, and instead of a general charge the jury's decision is solely embodied in answers to special issues which

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are in the form of questions. Such charge containing the special issues was submitted to the Texas jury, and they returned their answers to such issues. Under Rule 301 of the Texas Rules of Civil Procedure (copied verbatim in the appendix hereto) the court's judgment is required to conform to the pleadings, the evidence, and the jury's verdict.

The jury's verdict was for the plaintiff on some issues and for the defendant on some issues, and the trial court, in applying Rule 301, decided that the essential issues had been found in favor of the plaintiff and rendered judgment accordingly. Defendant appealed to the Court of Civil Appeals, and that court, applying Rule 301, which to repeat, required that the judgment conform to the pleadings, the evidence, and the jury's verdict, determined that under the pleadings, the evidence, and the verdict, the essential issues had been answered in favor of the defendant, and consequently reversed and rendered the case.

Plaintiff had his jury trial, and the jury found the essential issues of fact against him, and that is what the Court of Civil Appeals decided.

The facts themselves are so simple and stated in such detail in the opinion of the Court of Civil Appeals that all that needs to be repeated here is that plaintiff, who is in charge of the operation, got his leg broken when the hardened babbit fell out of the pot he was turning over. A babbit pot looks considerably like an old-fashioned kitchen sink, and plaintiff had gotten it out of the furnace and had it on the ground. There was no hurry, and men would

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be along in a few minutes to help him, but the plaintiff decided to empty the babbitt out of the pot, and although he had gone through the same operation many times before with adequate help and although there was plenty of help available to him, he and one other man who was near by turned over the pot and the babbitt fell out on plaintiff's leg. Plaintiff admitted that there was nothing wrong with the operation except that he had put his leg in the way, and that he had done it before with plenty of help and there was no danger incident to doing it that way.

One additional statement is probably essential, and that is that in spite of some of the implications of petitioner's language this is *not a case* where the employer furnish two ways to do the work, one safe and one less safe or dangerous. The employer only furnished one way to do the work, and that was manually with adequate help. Deen was not given any alternative; he was only given the one way to do the work, to-wit, by hand with help. As the Court of Civil Appeals construed the jury's finding, the jury found that defendant did not fail to furnish adequate help, and that such help was available to Deen. No one had ever heard of any other method of flopping over a pot, vat or sink, and no other method was furnished. The only claim as to tools was the testimony of the plaintiff (as quoted by the Court of Civil Appeals) that some type of clamp might be manufactured to clamp on the pot so that the hoist (which was furnished) could be attached to the pot, and then it could be handled by one man. Plaintiff admitted that

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such procedure would be dangerous, whereas he further admitted that turning over the pot with plenty of help available was safe.

Let us repeat that no one has denied Deen a jury trial. He got a jury trial, and the jury found the essential issues against him. There is no provision of the Federal Employer's Liability Act or the Constitution of the State of Texas or the United States that guarantees a railroad employee that a judgment will be entered in his favor if a jury find any issue, however immaterial, in his favor.

JURISDICTION

While there is no issue but that this action was brought under the Federal Employer's Liability Act, by a railway employee engaged in interstate commerce, against an employer engaged in interstate commerce, that admission does not create either jurisdiction or grounds for this court exercising its discretion in granting certiorari. This action was brought by the plaintiff in the District Court of the State of Texas. Procedure is governed by the rules and statutes of the State of Texas. One of the applicable rules is Rule 301, Texas Rules of Civil Procedure, which is copied in full in the appendix hereto, the first sentence of which reads as follows:

> "Rule 301. Judgments. The judgment of the court shall conform to the pleadings, the nature of the case proved, and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or in equity."

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Under this rule (which is merely Article 2211 of the Revised Civil Statutes of the State of Texas of 1925 continued in the Rules of Civil Procedure), the trial court or, on appeal, the Court of Civil Appeals must disregard the answer to any special issue not supported by the pleadings, not supported by the evidence, or which becomes immaterial in light of the other special issues.

Socony-Vacuum Oil Co. vs. Aderhold, 150 Tex. 292, 240 SW (2d) 751;
Whittenberg vs. Miller, 139 Tex. 586, 164 SW (2d) 497;
Sproles vs. Rosen, 126 Tex. 51, 84 SW (2d) 1001;
Starr vs. Ferguson, 140 Tex. 80, 166 SW (2d) 497;
Gardner vs. Goodwin Wholesale Grocery Co., 133 Tex. 423, 256 SW 911.

If the Texas Court of Civil Appeals correctly applied the Texas Rules of Civil Procedure to the Texas form of pleadings, the evidence introduced under the Texas practices, and the special issue verdict returned in accordance with Texas practice, then both its decision and the judgment in this case is correct. On the other hand, if the Texas Court of Civil Appeals incorrectly applied the Texas Rules of Civil Procedure to Texas pleadings, Texas special issues, and to a Texas judgment, such error does not constitute the basis for jurisdiction or the granting of certiorari herein.

McGoldrick vs. Gulf Oil Corp., 309 U.S. 2, 60 S. Ct. 375, 84 L. Ed. 536;

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Stemberg vs. Georgia, 343 U.S. 591, 72 S. Ct. 834, 96 L. Ed. 1130;
Bechtel vs. Wilson, 204 U.S. 36, 27 S. Ct. 243, 51 L. Ed. 361;
Benson vs. M. K. & T. Ry. Co., 200 SW (2d) 233 (Cert. Den.), 332 U.S. 830, 92 L. Ed. 403, 68 S. Ct. 206.

ON THE MERITS

The Court of Civil Appeals did not hold contrary to the statute (45 U.S.C.A. Sec. 51 et sec.) or any decision of this court. The Court of Civil Appeals said that the statute and the decisions of this court require that the employee obtain a jury finding of negligence on the part of the employer proximately causing any damage for which he sues.

This was a simple case, a simple job of work to be done, there was no hurry, and plaintiff was the man in charge. All he had to do (sooner or later) was to get the babbitt out of the old worn-out pot, which was safely on the ground, no danger to anyone and in nobody's way. The employer had provided *only one method* for doing the work, and that was to manually turn over this pot. Nothing complicated about it, and all that was involved was the same things that were involved if an old-fashioned kitchen sink was on the floor and someone wanted to flop it over so that it would be top down on the floor. The method provided was for five or six men to get around and behind and turn it over away from them, and when it came face down on the floor, of course, the

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babbitt would drop to the floor and then the pot would be flopped on off.

The jury found that the defendant did not fail to furnish enough men to turn the babbitt pot over with safety. Due to the method of submitting special issues, the actual finding was not word for word that, but that is the substance of it and that is the way the Court of Civil Appeals construed it. To put it in the affirmative, the jury found that the defendant furnished enough men to do the work with reasonable safety. That was the only method provided by the defendant.

In this case the jury found against the plaintiff by finding that defendant had furnished a reasonably safe way to do the work. Where the employer has furnished a reasonably safe way to do the work, it cannot be charged with negligence because he did not furnish an additional safe way to do the work. As pointed out in the opinion of the Court of Civil Appeals, the petitioner here recognized that rule of law in his pleadings when he alleged that it was our obligation to furnish *either* adequate help to do the work in safety or proper tools to do the work in safety. The Court of Civil Appeals' construction of plaintiff's pleading and its statement of the law as contained in the following quotation from that opinion (275 SW (2d) 531):

> "Deen's complaint was, in substance, that it was the company's duty to do one of two things, either furnish tools or additional help to remove the babbitt. Deen seems to recognize in his pleadings the correctness of appellant's proposition

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that the company did not have a duty to furnish more than one reasonably safe way to do the work.

(1) We shall now attempt to determine the correctness of appellant's contention that the verdict and the undisputed evidence show that the babbitt could have been removed with reasonable safety with the additional help available to Deen. If this contention is correct, the railway company had furnished one reasonably safe way to do the job and it had no duty to furnish a second reasonably safe way, that is, to furnish Deen with tools. In other words, if there was no need for tools the railway company had no duty to furnish them."

The Court's statement of the rule of law is supported by the cases it cites, to-wit:

Western Union Telegraph Co. vs. Coker, 146 Tex. 190, 204 SW (2d) 977, 979;

Louisville & N. R. Co. vs. Davis, 6 Cir., 75 F. (2d) 849;

August vs. Texas & N. O. R. Co., Tex. Civ. App., 265 SW (2d) 148, 153 (RNRE);

Armstrong vs. Missouri-Kansas-Texas R. Co. of Texas, Tex. Civ. App., 233 SW (2d) 942, 946 (RNRE);

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McGivern vs. Northern Pac. Ry. Co., 8 Cir., 132 F. (2d) 213, 217;

Thompson vs. Pennsylvania R. Co., 6 Cir., 88 F. (2d) 148, 150;

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Johnson vs. Pulliam, Tex. Civ. App., 161 SW (2d) 589 (RWM).

Additional authorities appear in the appellant's brief filed in the Court of Civil Appeals (which has been filled herein), page 38 to 49 inclusive, and page 57 to 72 inclusive.

We have repeated twice, and repeat again, that the employer in this case only furnished one way to do the work, and that was manually by turning the pot over by hand. The jury found that the employer furnished enough help that the work could be done manually with reasonable safety. This is not a case, although the petitioner (see petition, p. 20 and 21) by citing *Wilkerson vs. McCarthy*, 93 L. Ed. 497, 366, U.S. 53, and *Virginia Ry. Co. vs. Viars* (4th Cir.), 193 Fed. (2d) 547, implies that it is, where the defendant furnished two ways to do the work, one safe and one unsafe. In the Wilkerson case the employer had furnished a longer and safer route, and a short and dangerous route. In the Viars case several ways of doing the work had been furnished, and one included dynamite, which method was found to be dangerous. Deen was just furnished one way to do the work, that is, manually with plenty of help, and the jury found, contrary to his evidence and his contentions, that the railway company furnished him adequate help to do the work in safety. The petitioner here does not challenge the sufficiency of the evidence supporting the jury's finding that the defendant furnished enough man power to do the work in safety.

Therefore, in order to hold that the Court of Civil Appeals was wrong, this court must decide:

> "Where the only method of doing the work provided by the employer is manual, and a jury, on adequate evidence, finds that sufficient man power was furnished by the employer to do the work in reasonable safety, the employer may nevertheless be held liable for not devising or designing some untried equipment which may be safe or might be dangerous and which might have enabled the plaintiff to perform the same job alone."

The plaintiff was not deprived of any jury trial; he got a jury trial, and the jury found against him on essential issues. The Court of Civil Appeals did not decide the case on any new principle of law, on any principle of law contrary to anything that this court has held, nor contrary to either the letter or the spirit of any statute. The case is a very simple one, where a Texas trial court erred in determining which special issues were immaterial in the light of the pleading, the evidence, and the law, and a Texas Court of Civil Appeals disagreed with that trial court and held that the jury's findings on special issues, which under the pleadings, the evidence and law were controlling, required a judgment for the defendant.

CONCLUSION

It is respectfully submitted that the Court of Civil Appeals opinion, against which this petition is directed, more accurately states the facts involved, the pleadings of the parties involved, and the holding and decision of such Court of Civil Appeals than does petitioner's statement as filed herein.

As reflected by the opinion of the Court of Civil Appeals in this case, this is simply a case where the employee had a jury trial and the jury found against him on the essential issues. No federal question is involved, and no error has been committed.

It is respectfully submitted that the petition for a writ of certiorari should be denied or dismissed.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent*

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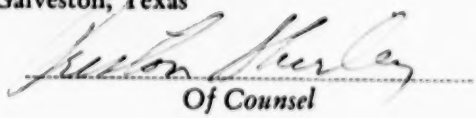

Of Counsel

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I certify that a copy of the foregoing respondent's reply to petition for writ of certiorari has been mailed on the 12 day of July, 1956, to the petitioner's attorneys, as follows: to Mr. David C. McCord, 519 Mercantile Bank Building, Dallas 1, Texas; and to Messrs. Johnson, Guthrie and Stanfield, 1608 Mercantile Bank Building, Dallas 1, Texas.

Preston Shirley

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APPENDIX

Vernon's Annotated Texas Rules of Civil Procedure, Vol. 2, p. 346:

"Rule 301. Judgments

"The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors."

In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 230

EARL R. DIEHL,

Petitioner,

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,

Respondent.

On Writ of Certiorari to the Court of Civil Appeals of Texas, Eleventh Supreme Judicial District at Eastland

---

BRIEF ON THE MERITS

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ALLEN PRINTING CO. — 1877 ROSS STREET — DALLAS 1, TEXAS

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In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. 199

EARL R. DEEN,

Petitioner,

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,

Respondent.

On Writ of Certiorari to the Court of Civil Appeals of Texas, Eleventh Supreme Judicial District at Eastland

---

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Civil Appeals of Texas, Eleventh Supreme Judicial District, at Eastland (R. 177-191), is reported in 275 S. W. 2d 529.

JURISDICTION

1. Jurisdiction is sustained by Title 28 U. S. C. A., section 1257, sub-section (3) (June 25, 1948, c. 646, 62 Stat. 929).

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2. The Statutes of the United States applied by the Court of Civil Appeals of Texas are 45 U. S. C. A., sections 51-59 (35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404).

3. The judgment of the Court of Civil Appeals of Texas was rendered February 4, 1955 (R. 191). Application for writ of error to the Supreme Court of Texas was refused, no reversible error, June 29, 1955 (R. 230), and motion for rehearing of application was overruled April 25, 1956 (R. 239). The Court of Civil Appeals is the highest court of the state in which a decision could be had within the meaning of 28 U. S. C. A., section 1257 (C. 646, 62 Stat. 929). *Michigan-Wisconsin Pipe Line Co. v. Calvert, U. S. Tex., 1954, 347 U. S. 157, 74 S. Ct. 396, 98 L. Ed. 583, rehearing denied.*

4. On June 25, 1956, petition for writ of certiorari was filed and was granted October 8, 1956 (R. 239).

STATUTE INVOLVED

The *Federal Employers' Liability Act (35 Stat. 65; 45 U. S. C. A., Sec. 51)* provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or hus-

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band and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

Respondent, Gulf, Colorado and Santa Fe Railway Company, states in its Reply to the Petition for Certiorari:

> "While there is no issue but that this action was brought under The Federal Employers' Liability Act, by a railway employee engaged in interstate commerce, against an employer engaged in interstate commerce, that admission does not create either jurisdiction or grounds for this court exercising its discretion in granting certiorari." (Respondent's Reply to Petition for Certiorari, p. 5.)

QUESTIONS PRESENTED

By Petitioner:

The question presented is whether the Court of Civil Appeals of Texas in sustaining all issues found by a jury in favor of the railway, respondent herein, and in disre-

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garding all issues found by a jury in favor of the injured employee, petitioner herein, and by reading into a verdict something that is not there, and in setting aside a judgment of a trial court, rendered in favor of the injured employee on the verdict of the jury, has deprived the injured employee of the right of trial by jury given him by the Congress under a Federal Statute generally known as the Federal Employers' Liability Act.

By Respondent:

In Respondent's Reply to Petition for Certiorari, it nowhere formally sets out Questions Presented from its point of view. From its reply as a whole the following appears to be the question from the point of view of the Respondent:

The petitioner was not deprived of any jury trial; he received a jury trial, and the jury found against him on essential issues.

STATEMENT

Petitioner was a coppersmith working in the shops of Respondent, Gulf, Colorado and Santa Fe Railway Company, at Brownwood, Texas (R. 11). On July 12, 1949, in the course of his employment, he was partially permanently disabled by having his right leg struck and trapped by solidified babbitt, weighing 650 to 700 pounds, which sloughed very suddenly out of a steel pot weighing 250 pounds, which he and a fellow-employee were tilting towards them for the purpose of overturning and emptying out the babbitt (R. 11, 18, 19, 40).

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Petitioner, Deen, pled, among other things, that his injuries proximately resulted from the negligent acts, jointly and severally, of the Respondent, in failing:

(1) to furnish proper tools to remove the babbitt, and

(2) to furnish at least two additional men to assist in removing the babbitt (R. 4).

Respondent, Gulf, Colorado and Santa Fe Railway Company, pled, among other things, that it was not guilty of negligence but if there were any negligence "it was the plaintiff's negligence and proximately contributed to his alleged injuries" (R. 8).

The trial court considered the pleadings and the evidence, particularly in view of the railway company's offering no evidence, sufficient to justify the submission of certain special issues to the jury (R. 151-156). The findings of the jury in response to these special issues may be summarized as follows:

(1) that the railroad failed to furnish Deen proper tools to remove the babbitt from the melting pot, that such failure was negligence, and was a proximate cause of his injuries;

(2) that the railroad did not fail to furnish one or more additional men, other than Snow, to assist plaintiff in removing babbitt from the pot;

(3) that the railroad did not fail to give to plaintiff proper supervision at the time and on the occasion in question;

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(4) that Deen was negligent in failing to obtain additional help and this was a proximate cause of his injuries;

(5) that Deen was not negligent in the manner and method that he used in doing the work;

(6) that the railway company could reasonably anticipate that Deen would do the job in the way and manner that he did;

(7) that the sole proximate cause of Deen's injuries was not due to his own acts and conduct;

(8) that $39,000.00 will reasonably compensate Deen for his injuries, and

(9) that Deen's own negligence should reduce the recovery $17,550.00 or 45% (R. 151-154).

The trial court reconciled the findings of the jury and allowed Deen a recovery in the sum of $21,450.00 (reducing Deen's damages in the sum of $39,000.00 by $17,550.00, as found by the jury, because of his contributory negligence) with interest thereon at the rate of 6% per annum from April 26, 1954, and all costs of court, which is the only judgment that could be rendered without disregarding any of the findings of the jury (R. 150-157). The Texas Court of Civil Appeals set aside the verdict of the jury and the judgment of the trial court rendered thereon, and rendered judgment that the plaintiff, Deen, recover nothing. *(Opinion, Gulf, Colorado & Santa Fe Railway Company v. Earl R. Deen, 275 S. W. 2d 529* (R. 177-191).

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Not only the pleadings but also the evidence support the above jury findings. Deen had worked as a coppersmith about eleven years prior to July 12, 1949, the date of his injury (R. 11). On that day a locomotive was in the shops for repair (R. 13). The assistant foreman, Mr. Williams, told him: "I have got to have this engine today" (R. 13). Babbitt, an alloy of antimony, copper and tin, was necessary for these repairs (R. 15). The babbitt available was in a cracked pot on the furnace that leaked so badly the molten metal would put out the fire underneath (R. 15). Shortly after the assistant foreman, Williams, told Deen the locomotive had to be out that day, W. J. Bettis, clerk to the general foreman, Johnson, told Deen in the presence of Mr. Johnson that his new babbitt pot had arrived at the freight depot, that men from the store department had gone for it and if he had the old one off the furnace the men on arrival could assist him with the new one (R. 14, 76). The old pot weighed 250 pounds and contained solidified babbitt weighing 650 to 700 pounds (R. 18). Deen attempted to get the old pot off the furnace alone and to get the babbitt out of the old pot so that he would have everything ready for the new pot and be ready to do his part in melting the babbitt for use on the engine as soon as possible (R. 18). A crane on a pole affixed to the concrete floor with a hoist was right beside the furnace for lifting heavy objects (R. 14). The 250-pound steel pot, about a yard long, ⅔ of a yard wide, and ⅓ of a yard deep (R. 17), containing 650 to 700 pounds of babbitt, a total weight of almost half a ton, fitted so snugly in the furnace

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that it was necessary to pry its 1½ to 2-inch rim (R. 19), off the brick furnace a height of about an inch (R. 14) so as to allow the arms of the crane to grip it and lift it from the furnace (R. 14-15). A buggy bar or pinch bar was used by Deen to pry the pot and babbitt off the furnace so it could be gripped by an available crane (R. 14). Deen did this work alone and in the process the pot and babbitt crashed to the concrete floor (R. 15). Chance thus selected the spot on the floor where the heavy pot, with its heavier contents, was placed, although Deen testified it dropped just about where he would have set it down (R. 49). It fell upright and Deen decided that since babbitt on cooling contracts more than steel, if he could turn the pot over, the babbitt would fall out and be available for the new pot on its briefly anticipated arrival (R. 18). He struggled alone to overturn the pot but was unsuccessful (R. 18). Earl Snow, a fellow-employee, working as an acting blacksmith in the shop nearby, saw Deen's struggle and voluntarily came to his aid (R. 18, 19). The two tried to overturn the pot away from them but were not strong enough to do so (R. 18). Deen braced himself on the furnace (which was crowded close to the pot) and Snow on the work bench, and, by pulling the pot towards them, they were able to raise it slowly to an upright position (R. 19), when the babbitt sloughed out of the pot (R. 19) very fast (R. 97). The babbitt struck the right leg of Deen (R. 19), crippling him for life (R. 40). The customary method of handling the extraction of solidified babbitt from the steel pot had been to lift the pot and the babbitt off the furnace with the

crane, as Deen did, place it on the floor, release the arms of the crane, get five or six men to come and turn the pot over manually, empty out the contracted babbitt, and then again attach the arms of the crane and hoist the pot back on the furnace (R. 52, 71, 103, 104).

It was petitioner's position in the trial and the appellate courts that the pot should be so equipped with clamps that it could be gripped by the arms of an available crane which was used to lift it off the furnace so that it could be overturned on the floor and its contents emptied (R. 71). The petitioner, who worked with the pot, day in and day out, said this should have been done (R. 71). Earl Snow, a fellow-employee and acting blacksmith, testified the pot was not equipped to be handled with the hoist (R. 89). He testified I-bolts could be fixed in the pot to fasten the hoist to and that he could have made such attachments in the blacksmith shop (R. 89). Deen, the petitioner, testified that if the crane could have gripped the pot, he could have tilted the pot and contents over with one finger and that he could have tilted the pot away from him so that the babbitt would have fallen on the floor and not on him (R. 71). In lifting the pot and contents with the crane from the furnace, it had slipped and fallen from the hoist (R. 15). The foreman and assistant foreman, on a number of times, knew the pot was being lifted off the furnace and the contents emptied, and they had not made any attempt, or said anything about making a tool to handle it (R. 71). Anderson, a witness called by the plaintiff, said the avail-

able tools were not adequate to overturn the pot and dump the babbitt (R. 103).

The railway company offered no evidence at all.

SUMMARY OF ARGUMENT

In the petition for writ of certiorari and the reply thereto, issue was solely joined on the question whether petitioner or respondent was entitled to judgment on the jury findings. The findings clearly indicate an intention on the part of the jury to find in favor of the petitioner, Deen (R. 151-156). The trial court gave effect to all findings of the jury and rendered judgment in favor of petitioner (R. 150-157). The Court of Civil Appeals of Texas set this judgment aside and rendered judgment for respondent, which the Court of Civil Appeals was able to do only by disregarding some of the findings of the jury (R. 150-157). Judgment rendered by the trial court was correct (R. 150-157).

The sufficiency of the pleadings and the evidence to support all the findings of the jury is a matter that may be raised by respondent or even by the Honorable Supreme Court in the absence of any cross-appeal. Petitioner's pleadings, liberally construed, amount to a pleading that the failure of the railway company to furnish proper tools and adequate help were joint and several acts of negligence which were each a proximate cause of petitioner's injuries (R. 4). The trial court submitted the case to the jury on that theory and the trial court rendered judgment in favor of petitioner on that theory (R. 150-157).

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The jury found in favor of the railway on issues as to whether the railway failed to furnish adequate help, whether Deen was negligent in his failure to use available help and whether this was a proximate cause of his injuries (R. 151, 153). Both sides in this Court concede the evidence on these issues was conflicting and cannot be disturbed by an appellate court.

It is likewise Deen's contention that all issues answered in his favor were also supported by the evidence. It is not true, as the Court of Civil Appeals found, that all issues answered in favor of the railway were supported by the evidence while all issues answered in favor of Deen were not supported by the evidence (R. 177-192). It was Deen's contention that the steel pot should be so equipped with clamps that the crane that hoisted it on and off the furnace could overturn it and empty out its solidified metal contents when it reached the floor (R. 71). If an available machine could be used to overturn the steel pot to empty out its contents, railway employees would not be exposed to danger of the babbitt's suddenly sloughing out of the pot and falling on a foot or leg, as happened to Deen (R. 71). Deen said clamps should be provided (R. 71). Snow, a fellow-employee and acting blacksmith for the railway, said clamps should be so provided and he could make them in his shop (R. 89). Anderson, a fellow-employee, said the available tools were not adequate to overturn the pot and empty out the babbitt (R. 103). The proposed method was so simple and practical a Court should take judicial knowledge thereof even in the absence of evidence. If the railway

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company knew of any scientific or practical reason that this type of tool should not be provided, it did not make such information available to the jury because the railway company offered no evidence at all.

Similar types of tools suggested by uneducated, but practical, experienced and trained railway employees had been previously held sufficient to support a jury verdict in a Master and Servant case on almost identical facts by the Court of Civil Appeals of Texas, and such holding was approved by the Supreme Court of Texas.

> *Galveston, H. & S. A. Ry. Co. v. Brewer (1928) (Court of Civil Appeals, Galveston, writ of error refused by the Supreme Court of Texas), 4 S. W. 2d 320.*

The Court of Civil Appeals of Texas, in the *Deen* case, in holding that the verdict of the jury and the undisputed evidence established the railway company provided Deen a safe way to do his job and that if he elected to do his job in an unsafe way, when a safe way was open to him, he could not recover, has read into the jury's verdict something that is not there and has construed the evidence more favorably to the railway company than the company construed it, itself, in the trial court (R. 130).

In attempting to uphold such an erroneous holding of the Court of Civil Appeals of Texas, the Supreme Court of Texas reasoned itself into an anomalous situation where, in the same opinion, in discussing the *Ross* case and the *Deen* case, it reached opposite conclusions on identical

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facts. (See *Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220,* and comparison of the two cases on pages 26 to 29 of this Brief.)

Even if the jury had found the railway had provided Deen a safe way to do the job, which it did not, such finding would not defeat Deen's recovery, if the railway was also guilty of negligence which contributed to his injury [*Clyde Wilkerson v. Wilson McCarthy and Henry Swan, as Trustees of Denver & Rio Grande Western R. Co., Utah 1949, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 reh. den. 336 U. S. 940, 93 L. Ed. 1098, 69 S. Ct. 744; Virginian Ry. Co. v. Viars (1952) (4th Circuit) 193 F. 2d 547, 550.*]

The petitioner was entitled to judgment on the jury's findings under the decisions of the Honorable Supreme Court of the United States as well as decisions of the appellate courts of Texas.

ARGUMENT

On page 27 of this Brief, the findings of the jury in response to special issues submitted to it, in accordance with the Texas practice, are set out. Petitioner and respondent both say they are entitled to judgment on these findings. The trial court agreed with petitioner and rendered judgment in his favor (R. 150-157). The Court of Civil Appeals of Texas said the trial court erred in rendering judgment in favor of petitioner and reversed that judgment and rendered judgment in favor of respondent and that petitioner recover nothing (R. 191-192). The

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Supreme Court of Texas refused application for writ of error (R. 230-231) and indicated its approval of the judgment of the Court of Civil Appeals by obiter dicta in another case, discussing the *Deen* case, decided about the same time, styled

Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220.

Issue is thus squarely joined as to whether the jury findings entitle petitioner or respondent to judgment. That is the only issue on which petition for writ of certiorari was resisted (Reply to Petition for Certiorari, p. 11). The intent of the jury from the findings (R. 151-154) is clear. The jury said the railroad was negligent in not furnishing proper tools and that such negligence was a proximate cause of Deen's injury (R. 151). The jury said the railroad did not fail to furnish additional men to assist Deen in removing the babbitt from the pot, that Deen was negligent in failing to obtain additional help and this was a proximate cause of his injuries (R. 151, 153). What is clearer than that the jury was finding the railroad guilty of negligence and Deen of contributory negligence? The intent of the jury becomes even clearer when the other findings are considered: Deen was not negligent in the manner and method he used in doing the work, the railway company could reasonably anticipate that Deen would do the job in the way and manner he did, the sole proximate cause of Deen's injuries was not due to his own acts and conduct, $39,000.00 will reasonably compensate Deen for his in-

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juries, and Deen's own negligence should reduce the recovery $17,550.00 or 45% (R. 153, 154, 156). The jury does not say Deen's negligence was the sole proximate cause of his injuries and that Deen's negligence should reduce his recovery 100%, as the Court of Civil Appeals says, for it (R. 189-190). The jury did not say, and was not given an opportunity to say, that Deen was provided a safe way to do his job (R. 151-156). The Court of Civil Appeals fudged when it said:

> "We think said answers, considered in connection with the record, must be construed as a finding that sufficient men were available to help Deen remove the babbitt with safety." (R. 181.)

The judgment of the trial court gives sense and effect to all the findings of the jury. The judgment of the Court of Civil Appeals gives sense and effect to all findings of the jury in favor of the railway company, but disregards all findings of the jury in favor of the injured workman. Apparently, the Court of Civil Appeals subscribed to the theory that the constitutional tribunal functioned properly only when making findings of fact in favor of the railroad.

The sufficiency of petitioner's pleadings and evidence to support the jury's findings made in his favor was not questioned by respondent in its reply to petitioner's application for writ of certiorari (Reply, p. 11). Since the Honorable Court of Civil Appeals experienced great difficulty in finding any pleadings or evidence supporting any jury findings in favor of Deen, but no difficulty in finding ample pleadings and evidence supporting all jury findings in favor of

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the railroad, and since respondent may raise such questions in this Court, even in the absence of a cross-appeal [*Langnes v. Green (Wash. 1931), 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520; Walling v. General Industries Co. (1947), 330 U. S. 545, 67 S. Ct. 883, 91 L. Ed. 1088*], petitioner will discuss such sufficiency. Great liberality in pleading is permitted in Texas. Inconsistent causes of action and defenses may be pled. Pleadings, though at all times liberally construed *(33 Tex. Jur., sec. 10, p. 420)*, are even more liberally construed after verdict of the jury *(33 Tex. Jur., sec. 182, p. 636)*. The Court of Civil Appeals seized upon certain clauses of Deen's petition to hold that since petitioner pled improper tools or inadequate help in the alternative, the burden was on him to prove both acts of negligence to prevail (R. 181, 190). The Court attempts to bolster this fallacious position by saying the case was submitted to the jury on that theory (R. 190). While Deen, in parts of his petition, appears to plead improper tools or inadequate help in the alternative, in another part he says clearly and definitely that his injuries were the direct and proximate result, jointly and severally, of the negligent acts of the defendant in the following respects:

(1) not furnishing plaintiff with proper tools;

(2) not furnishing at least two additional men to assist plaintiff in removing the babbitt from the pot (R. 4).

No special exceptions to plaintiff's petition were urged by the defendant in the trial court on the ground that it was

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ambiguous or inconsistent (R. 6-7). Contrary to what the Court of Civil Appeals of Texas says, the case was not submitted to the jury on the theory that the railroad need only to prove the furnishing of proper tools or adequate help to prevail (R. 151-156). If this had been so the trial court would have instructed the jury that if it answered the issue on the failure to furnish proper tools in the negative, then it need not answer the issue on the failure to furnish adequate help. It will be noted that throughout the charge when a subsequent issue became immaterial because of a previous answer, the jury was instructed not to answer the subsequent issue (R. 151-156). Since the trial court rendered judgment for Deen, the Court of Civil Appeals has presumed that the trial court submitted the case to the jury on one theory and rendered judgment on another, when it is the duty of the Court of Civil Appeals to make an exactly opposite presumption.

It is very interesting to note the Court of Civil Appeals found Deen's negligence in failing to use additional help as the sole proximate cause of his injuries (R. 191) despite the fact that the jury expressly found that the sole proximate cause of plaintiff's injuries was not due to his own acts and conduct (R. 154), and despite the fact that the railway company only pled Deen's failure to obtain additional help as contributory negligence (R. 8).

The evidence, as well as the pleadings, amply supports all findings of the jury. Petitioner believes the jury was in error in finding that the railway company did not fail to

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furnish Deen adequate help and Deen's failure to use such help was negligence and a proximate cause of his injuries (R. 151, 153). The statement of the general foreman's clerk, Bettis, made, in the presence of the general foreman Johnson, to Deen, that if he had the old pot off the furnace the men who brought the new one could assist him in placing it, certainly indicates help was limited (R. 14). It is also contrary to human nature that a servant is so eager about his master's business that he will struggle first alone and then with the assistance of a volunteer to overturn a steel pot and contents weighing almost half a ton, when adequate help is available. However, petitioner does not subscribe to the theory that he is only bound by the findings of the jury that are in his favor. Since both sides accept the findings of the jury that the railway company furnished adequate help and that Deen was negligent in not using such help and this was a proximate cause of his negligence, a summary of the evidence on these points is unnecessary.

The evidence which petitioner has set out in his statement fully justifies the submission to the jury of the negligence and proximate cause issues based on the railway company's failure to furnish proper tools. Deen's position was this: that the heavy steel pot should have been so equipped with clamps that the crane, right beside it, which was customarily used to lift it on and off the furnace (R. 15), could be used to overturn it and empty out its heavier contents when it reached the concrete floor (R. 71). Peti-

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tioner, who worked with the pot day in and day out, said this should have been done (R. 70). Deen testified if the crane could have gripped the pot, he could have tilted the pot and contents over with one finger, and that he could have tilted the pot away from him so that the babbitt would have fallen on the floor and not on him (R. 71). Earl Snow, a fellow-employee and acting blacksmith, testified I-bolts could be fixed in the pot to fasten the hoist to, and that he could have made such attachments in the blacksmith shop (R. 89). Anderson, a fellow employee, said the available tools were not adequate to empty the babbitt out of the steel pot (R. 103).

Instead of viewing this evidence in a friendly light and construing it in favor of the verdict of the jury, the Court of Civil Appeals resorted to certain obvious devices in an attempt to destroy its probative force:

(1) The Court of Civil Appeals, as petitioner has heretofore pointed out, seized upon certain wording in petitioner's pleading to hold that since petitioner pled inadequate help and lack of proper tools in the alternative, it had to prove both acts of negligence to succeed, and respondent need to disprove only either inadequate help or lack of tools in order to succeed (R. 190-191). Therefore, since the jury had found adequate help was furnished, the evidence and findings bearing on lack of proper tools became immaterial (R. 191). As previously pointed out, this is a misinterpretation of the pleadings.

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(2) The Court of Civil Appeals further attempted to discredit this evidence by saying:

> "Furthermore, there is no evidence that the additional tools suggested by Deen and Snow were in use, safe and approved." (R. 190.)

Here the Court of Civil Appeals gets back to an old railroad defense which has been used so many times and in so many cases it would be useless to enumerate them. (See *B. & O. R. Co. v. Groeger, 1925, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419.)* This defense is that the operation of railroads is a scientific matter and that what safety measures or tools they should use should be left to their officers and experts and not to the varying and uncertain opinions of coppersmiths and blacksmiths, like Deen or Snow, or to the varying and uncertain verdicts of juries. This theory has been thoroughly discredited by numerous decisions of the Supreme Court of the United States, hereafter cited. Apart from the fact that all factual questions are for the jury under the Federal Employers' Liability Act, a complete answer to the railroad in this particular case is that if it had any scientific or expert knowledge concerning the safety measures proposed by Deen and Snow, it withheld such information from the jury. The railroad offered no evidence. Why did it not give the jury the benefit of any expert knowledge it had? The railway company's silence materially strengthens the probative force of the evidence offered by Deen:

> *Texas & Pacific Ry. Co. v. Riley (1944) (Court of Civil Appeals of Texas, 183 S. W. 2d 991, writ of*

error refused by the Supreme Court of Texas, certiorari denied, 325 U. S. 873, 65 S. Ct. 1414, 89 L. Ed. 1991).

This is a death case arising under the Federal Employers' Liability Act. The Court of Civil Appeals, in passing on the sufficiency of the evidence to support the jury's findings, said:

> "Moreover, these circumstances are materially strengthened by the failure of appellant to offer any explanation of the occurrence resulting in Riley's death which would excuse it."

The simple device suggested by Deen and Snow which would have enabled the heavy steel pot to be overturned by an available crane is a matter within the judicial knowledge of a court:

Swann v. T. & P. Ry. Co. (1919), Court of Civil Appeals, Texas, 200 S. W. 1131.

> "The existence of hoisting machinery which may be employed for lifting heavy weights is a matter of such common knowledge that evidence to that effect was not required."

Practical suggestions for increasing the safety of operations made by uneducated but practical men have been accepted by the appellate courts in Texas as raising issues of fact for the jury in railway Master and Servant cases despite the very attacks made by the railroad in the *Deen* case. One of the closest cases on the facts to the *Deen* case is:

Galveston, H. & S. A. Ry. Co. v. Brewer (1928) (Court of Civil Appeals, Galveston, writ of error refused), 4 S. W. 2d 320.

Brewer was injured by being struck by a falling heavy timber referred to as a "stringer." He was working for the railway company at the time, helping to load heavy timbers by means of a hoisting machine which consisted of a power appliance, a crane, cables and hooks. Brewer would fasten a hook on one end of the timber, another employee would fasten a hook on the other end, and by means of chains the timber would be hoisted to a railway car. One of the chains, or some connection used therewith, slipped and the timber fell, striking Brewer in the back and injuring him. Brewer introduced in evidence the testimony of a fellow-employee to the effect that the chains leading to the timber were not connected and that if they had been connected at the top by a ring, the accident could not have happened. The simple, practical safety appliance suggested here is analogous to the clamps Deen and the blacksmith, Snow, said should have been affixed to the steel pot to permit its being overturned by the available crane. The cross-examination by the railway company, in the *Brewer* case, followed almost the identical line the cross-examination followed in the *Deen* case. The witness in the *Brewer* case, on cross-examination, stated he had never seen a ring like he testified about. In all the hoisting machines he had seen, he had never seen one like that in use. That he was in the United States Navy over two years during the war and never saw them use an appliance similar to the one he was recommending. The Court of Civil Appeals held that it was

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obvious the simple changes proposed in the *Brewer* case would greatly protect the railway company's employees and was sufficient to support findings of the jury (1) that the railway company did not furnish its employee reasonably safe appliances, and (2) such failure was the proximate cause of his injury. The Supreme Court of Texas refused an application for writ of error, which indicates, in Texas practice, that it approved the holdings of the Court of Civil Appeals on the questions discussed.

(3) The third device the Court of Civil Appeals used in an attempt to destroy the probative force of Deen's evidence and the findings of the jury based thereon, was to read into the jury's verdict something that was not there, i.e., the verdict of the jury established that the railway company provided Deen a safe way to do his job (R. 189-190). The jury did find Deen was negligent in not using available help and this was a proximate cause of his injuries (R. 153). The jury did not say and was not given an opportunity to say whether with additional help Deen could have done the job safely. The jury might have concluded that under no circumstances should Deen have attempted to move a half-ton steel pot alone. To so strain himself would be dangerous. If it were to be manually handled, more help should be used. But the jury might have concluded, if given an opportunity, that even with adequate help the manual handling of the half-ton pot and contents would nevertheless be dangerous. That was the theory of

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the railroad in the trial court. Consider the following cross-examination of Deen by the attorney for the railroad:

> " 'Q. And the strain in getting it' (the melting pot) 'up was over before it' (the babbitt) fell on your foot?
>
> "A. Yes, sir.
>
> "Q. As a matter of fact, these extra men would have been helpful to you only in getting it upright; is that right, Mr. Deen?
>
> "A. Yes, sir.
>
> "Q. And whether there had been five or ten men there, would not have had anything to do with the babbitt falling out of the pot?
>
> "A. No, sir.
>
> "Q. It would have fallen out if the whole shop had been there with you?
>
> "A. It might have fell on two of us." (R. 63.)

Consider the following cross-examination of Snow, a witness called by petitioner, by the attorney for the railroad:

> "Q. All right. And that third man*d* wouldn't have kept the babbitt from falling out, would he, Mr. Snow?
>
> "A. No, sir; I don't think so.
>
> "Q. In other words, the babbitt is coming out after you get the pot up-right, whether there were three men or six men ahold of it?
>
> "A. That's right." (R. 93-94.)

In its Motion for an Instructed Verdict, the railway company urged "it is undisputed that as far as the accident itself is concerned, additional employees could not and

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would not have prevented this happening" (R. 121). In its objections to the court's charge, the respondent said the issue as to whether the failure to furnish additional help was a proximate cause of Deen's injuries should not be submitted to the jury "for reason that under the undisputed evidence the failure to furnish one or more additional men was not and could not be a proximate cause of plaintiff's injuries" (R. 130). We thus have the anomalous situation that the Court of Civil Appeals in stating that the finding of the jury that the railway did not fail to furnish adequate help, when considered in the light of the record, amounted to a finding that the railway furnished Deen a safe way to do his job, resulted in the Court of Civil Appeals' construing the evidence more favorably to the railway than the railway construed it itself. Isn't it a travesty on justice for the Court of Civil Appeals of Texas to tell Deen to limp through life without any compensation because of a fact that the railway company said had nothing to do with the accident?

The warping of the jury verdict by the Court of Civil Appeals of Texas in saying that it amounted to a finding that the railway company provided a safe method for Deen to do his job, was condoned by the Honorable Supreme Court of Texas. The Supreme Court of Texas refused Deen's application for writ of error with no comment other than that the Court of Civil Appeals had committed no reversible error (R. 231). The Court reached this decision within three months after Deen filed his application (R. 198, 230). Apparently the Court's conscience was a little

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bit disturbed by this decision. Deen's motion for rehearing of his application was under consideration ten months (R. 231, 239). While Deen's application for writ of error was pending before the Supreme Court of Texas, the Court decided *Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220, opinion of Court of Civil Appeals, 278 S. W. 2d 227.* This was a Federal Employers' Liability Act case. By obiter dicta in the *Ross* case, the Supreme Court of Texas indicated why it was going to refuse the writ of error in the *Deen* case. The Court said, in the *Ross* case, the Court of Civil Appeals was justified in the *Deen* case in concluding that the verdict of the jury and the undisputed evidence established that the railroad furnished Deen a safe way to do the job and therefore was under no duty to furnish him a second method of performing the work. The Court came to an exact opposite conclusion on identical facts in the *Ross* case. We thus have on our hands the interesting situation of the Supreme Court of Texas, in obiter dicta devoted to the *Deen* case, reversing its own decision in the *Ross* case, and in the same opinion. The following comparison of the two cases will convince the most incredulous of the accuracy of this statement.

ROSS CASE	DEEN CASE
1. *Facts*	1. *Facts*
(a) Ross and volunteer fellow-employees seek to overturn drum	(a) Deen and volunteer fellow-employee seek to overturn steel pot
(b) Drum very heavy	(b) Pot very heavy

(c) Additional fellow-employees available to help

(d) Assistance of fellow-employees not sought

(e) Alternate methods of doing job:

(1) placing drum on rack

(2) manually overturning drum with sufficient help

(f) Customary method:

(1) tilting drum with adequate help

(g) Tilting done many times before without mishap

2. *Jury Findings (See opinion of Court of Civil Appeals, 278 S. W. 2d 227)*

(a) Railroad negligent in not placing drum in rack

(b) Such negligence, proximate cause of Ross's injuries.

(c) Ross negligent in tilting drum without seeking or asking assistance

(d) Such negligence, proximate cause of Ross's injuries

(e) Ross's damages, $26,250.00.

(c) Additional fellow-employees available to help

(d) Assistance of fellow-employees not sought

(e) Alternate methods of doing job:

(1) lifting pot with available crane

(2) manually overturning pot with sufficient help

(f) Customary method:

(1) tilting pot with adequate help

(g) Tilting done many times before without mishap

2. *Jury Findings (R. 151-156).*

(a) Railroad negligent in not furnishing proper tools

(b) Such negligence, proximate cause of Deen's injuries

(c) Deen negligent in tilting pot without obtaining additional help.

(d) Such negligence, proximate cause of Deen's injuries.

(e) Deen's damages, $21,450.00

3. *Conclusion of Supreme Court of Texas*	3. *Conclusion of Supreme Court of Texas*
(a) The jury verdict does not amount to a finding that the railway company provided Ross a safe method to do his job because:	(a) The jury verdict does amount to a finding that the railway company provided Deen a safe method to do his job because:
"The jury could have reasoned that if the plaintiff had obtained the help of another workman, he would not have been injured from the effort of tilting the drum, but that the method was nevertheless unsafe because either or both of the workmen might be injured if they lost control of the drum." (Supreme Court's opinion, Ross case, at page 224.)	"We agree with the Court of Civil Appeals that the verdict of the jury and the undisputed evidence establish that the railroad furnished one reasonably safe way to do the job and therefore was under no duty to furnish a second method of performing the work." (Supreme Court's opinion, Ross case, at page 225.)
4. *Judgment:*	4. *Judgment:*
Ross—$26,250.00	Deen—nothing

Such judicial gymnastics were too much for the Honorable Clyde E. Smith, one of the Justices of the Supreme Court of Texas. While agreeing with the opinion of the Court so far as the *Ross* case was concerned, he dissented from the obiter dicta in the *Ross* case devoted to the *Deen* case, in the following words:

> "I am in agreement with the holding in this case;" (Ross case) "however, I am not prepared to agree with the conclusion in regard to the case of Gulf, C. & S. F. Ry. Co. v. Deen, Tex. Civ. App., 275 S. W. 2d 529,' that 'We agree with the Court of Civil Appeals that

> the verdict of the jury and the undisputed evidence establish that the railroad furnished one reasonably safe way to do the job and therefore was under no duty to furnish a second method of performing the work.' I, therefore, do not join in the conclusion reached as to the Deen case. In all other respects, I agree with the majority opinion." (Ross case opinion, page 228.)

It is ironical that the distinction which the Supreme Court of Texas labored so hard to make between the *Deen* and the *Ross* cases was one which, even if it existed—which it doesn't—would be wholly immaterial. This is clear from the following decisions:

> *Clyde Wilkerson v. Wilson McCarthy and Henry Swan, as Trustees of Denver & Rio Grande Western R. Co., Utah 1949, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497, reh. den. 336 U. S. 940, 93 L. Ed. 1098, 69 S. Ct. 744.*

In this case the employee elected to use a dangerous method of doing his work instead of a safe one. He slipped and fell from a board while crossing a pit. The Court said:

> "There was, as the state court pointed out, evidence to show that petitioner could have taken a slightly longer route and walked around the pit, thus avoiding the use of the board. This fact, however, under the terms of the Federal Employers' Liability Act, would not completely immunize the respondents from liability if the injury was 'in part' the result of respondents' negligence. For while petitioner's failure to use a safer method of crossing might be found by the jury to be contributory negligence, the Act provides that 'contributory negligence shall not bar a recovery, but

> the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee'."

That is the rule that the trial court observed in submitting the *Deen* case to the jury and in rendering judgment on the verdict of the jury (R. 150-157). A similar question was passed on by the United States Court of Appeals, Fourth Circuit (1952), in

Virginian Ry. Co. v. Viars, 193 F. 2d 547, 550.

Employee was electrocuted while exploding dynamite in the course of his employment. Defense urged that the employee elected to use a dangerous rather than a safe method of doing his work. The Court said on this point:

> "If, however, plaintiff adopted a dangerous way of doing the work, when a safe one was open to him, this amounted to nothing more than assumption of risk or contributory negligence, neither of which excuses defendant's negligence or bars recovery under the Federal Employers' Liability Act. Tiller v. Atlantic Coast Line Ry. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610; Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497. If plaintiff was guilty of negligence in using the dynamite, this did not bar him of recovery, if defendant was also guilty of negligence which contributed to his injury but went merely to the reduction of damages. This aspect of the case was fairly presented by the trial judge in his charge to the jury."

Deen has been deprived of his right of trial by jury by the appellate courts of Texas, whether that right is tested by previous decisions of the Texas Courts in similar cases, as *Galveston, H. & S. A. Ry. Co. v. Brewer, 4 S. W. 2d*

320, and *Port Terminal Railroad Association v. Ross, 289 S. W. 2d 220*, or by the decisions of the Honorable Supreme Court of the United States in its construction of the Federal Employers' Liability Act.

The Honorable Supreme Court of the United States has said so many times and so clearly that the Congress has made the jury the fact-finding body in Federal Employers' Liability cases and that the Court is not going to permit appellate courts, by substituting their findings for those of the jury, to deprive injured employees of a goodly portion of the relief that the Congress has given them, that it seems puerile to argue the point.

> *Atlantic Coast Line Railroad Company v. Anderson (1955) (U. S. Court of Appeals, 5th Circuit), 221 F. 2d 548.*

This case is of great interest to lawyers in Texas because it arose in the Fifth Circuit. In many ways the facts are analogous to the *Deen* case. Chief Justice Hutcheson, speaking for the Court, held the evidence not sufficient to support the jury verdict. Suit was brought in two counts under the Safety Appliance Act and the Federal Employers' Liability Act. The Supreme Court granted writ of certiorari and disposed of the case without written opinion.

> *Anderson v. Atlantic Coast Line Railroad Company (1955), 350 U. S. 807, 76 S. Ct. 60, 100 L. Ed. ....., rehearing denied, 350 U. S. 905, 76 S. Ct. 176, ... L. Ed. .....*

Other cases upholding jury verdicts in Federal Employers' Liability cases are:

Tiller v. Atlantic Coast Line R. Co. (1942), 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465;

Bailey v. Central Vermont Ry. Co. (1942), 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444;

Tennant v. Peoria & Pekin Union R. Co. (1944), 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520;

Blair v. Baltimore & Ohio R. Co. (1944), 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490;

Lavender v. Kurn (1946), 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916;

Ellis v. Union P. R. Co. (1947), 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572;

Wilkerson v. McCarthy (1948), 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; and

Stone v. New York, C. & St. L. R. Co. (1953), 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441.

The following cases are now before the Court on certiorari and have not yet been decided:

Schulz v. The Pennsylvania Railroad Co. (1955) (U.S. Court of Appeals, 2nd Circuit), 222 Fed. 2d 540; (This case arises under the Jones Act.)

Webb v. Illinois Central Railroad Company (1955) (U. S. Court of Appeals, 7th Circuit), 228 Fed. 2d 257.

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The great humanitarian and liberal principles embodied in the Federal Employers' Liability Act by the Congress and interpreted by this Court have meant little to the Supreme Court of Texas. When the great, humanitarian decisions noted above of the Honorable Supreme Court of the United States were brought to the attention of the Honorable Supreme Court of Texas, in Deen's application for writ of error, that Court said of them in its obiter dicta about the *Deen* case in

> *Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220, 226:*
>
> "The decisions of the Supreme Court" (United States) "which are cited by the parties represent only that Court's appraisal of the facts there involved, and are of little assistance in the determination of cases which are not factually analogous."

The Supreme Court of Texas is still waiting for a clear mandate from the Supreme Court of the United States as to what it really means when it says injured employees must not be deprived of their right of trial by jury in Federal Employers' Liability Act cases, and has encouraged Texas appellate courts to continue, as in the *Deen* case, to substitute their findings for that of the jury, in these words:

> "So long as that Court" (Supreme Court of the United States) "continues to pay even lip service to the principle that liability of the railroad employer is based only upon negligence, it is incumbent upon the state courts to recognize and apply the principle in cases presented for their determination. Until required to do so by a clear and positive declaration of the highest federal tribunal, our trial and appellate

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> courts cannot and should not give effect to a jury finding of negligence when in its opinion the record is completely devoid of evidence in support of same." (Obiter dicta re. Deen case, Ross Opinion at page 226.)

Why should a trial court obtain a jury finding if the record is completely devoid of evidence in support of same? Are jury findings to be followed if they correspond to the Court's evaluation of the facts, but otherwise disregarded on the ground that the record is completely devoid of any evidence to support them, as the Court of Civil Appeals did in the *Deen* case? It is truly remarkable that in the *Deen* case the Court of Civil Appeals found the jury properly weighed the evidence when it made findings in favor of the railroad but improperly weighed the evidence when it made findings in favor of Deen. As petitioner has heretofore pointed out, application for writ of error was filed in the Supreme Court of Texas in the *Deen* case March 28, 1955 (R. 198). It was refused June 29, 1955 (R. 230). Motion for rehearing of the application was overruled April 25, 1956 (R. 239). It thus took the Supreme Court of Texas one year and one month to decide that the record in the *Deen* case was completely devoid of any evidence in support of any jury findings in favor of Deen.

CONCLUSION

Petitioner prays that the judgment of the Court of Civil Appeals that he recover nothing herein (R. 191) be reversed and that the judgment of the trial court that plaintiff, Earl R. Deen, do have and recover from the said defendant,

Gulf, Colorado & Santa Fe Railway Company, the sum of $21,450.00, together with interest thereon at the rate of 6% per annum from April 26, 1954 (R. 157), be affirmed, and that costs of court be taxed against the respondent, and petitioner prays for such other and further relief, general and special, at law and in equity, to which he may be justly entitled.

Respectfully submitted,

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January 7, 1957.

I certify that a copy of the foregoing Brief on the Merits for the Petitioner has been mailed, on the 7th day of January, 1957, to the respondent's attorneys, as follows: to Messrs. Wigley, McLeod, Mills and Shirley, Attorneys at Law, Union Station Building, Galveston, Texas; to Messrs. Woodruff and Holloway, Attorneys at Law, First National Bank Building, Brownwood, Texas; and to Messrs. Hudson, Keltner and Sarsgard, Attorneys at Law, 1313 Continental Life Building, Fort Worth 2, Texas.

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ROBERT LEE GUTHRIE.

FEB 4 1
JOHN T. FEY,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 199

EARL R. DEEN, *Petitioner*,

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent*.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 199

EARL R. DEEN, *Petitioner,*

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent.*

RESPONDENT'S REPLY BRIEF

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Earl R. Deen, has filed a "Brief on the Merits", and the respondent, Gulf, Colorado and Santa Fe Railway Company, without relinquishing its contention that certiorari was improvidently granted, presents this its brief on the merits.

JURISDICTION

Respondent concedes that this is an action properly brought under the Federal Employer's Liability Act (45 U.S.C.A. Sec. 51-59) by a railroad employee engaged in interstate commerce against an employer engaged in interstate commerce. On the other hand, the plaintiff in this case of his own volition chose not to file the suit in the United States District Court. He chose instead to file the suit in the District Court of

Brown County, Texas. While the record naturally could not show why he made this selection, it is obvious that by doing so he obtained a jury of his friends and neighbors he would not have obtained had he filed the suit in the United States District Court at San Angelo, Texas, and we think it is certainly true that he and his attorney believed that his chances were better and the probabilities of a high verdict were greater in the state court than in the federal court.

Pleadings of both parties were in accordance with state practice, the trial was in accordance with state practice, the submission of the case to the jury on special issues was in accordance with state practice. The jury's verdict in this case is embodied in their answer to special issues submitted in accordance with state practice. He had a jury trial, and the judgment appealed from to this Court is the judgment of a Texas Court of Civil Appeals, who construed the Texas pleadings, the Texas jury verdict, and entered judgment thereon in favor of the respondent.

It may be that, this Court having granted certiorari, it would be improper for the respondent to waste the Court's time with any extended argument or presentation of authorities. However, this Court can, of course, after further consideration, dismiss the writ as improvidently granted. Therefore, we will merely state to the Court that, while this Court did hold in *Brown vs. Western Railway of Alabama*, 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100, that a rule of pleading of the State of Georgia which denied an employee of a railroad company the right of a trial by jury created jurisdiction in the United States Supreme

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Court, that case certainly has no application here, where the plaintiff had a jury trial and had a fair opportunity to obtain a verdict in his favor. Illustrative of the cases in point is *McGoldrick vs. Gulf Oil Corporation*, 309 U.S. 2, 60 S.Ct. 375, 84 L.Ed. 536. Certainly, applying the Texas Rules of Civil Procedure to Earl R. Deen's cause of action did not put "unreasonable obstacles" in his way, nor was he deprived of a jury trial. In any event, petitioner does not contend that the Texas Rules of Civil Procedure deprived him of a jury trial (see petitioner's brief, p. 3).

QUESTIONS PRESENTED

By Petitioner:

The question presented is whether the Court of Civil Appeals of Texas in sustaining all issues found by a jury in favor of the railway, respondent herein, and in disregarding all issues found by a jury in favor of the injured employee, petitioner herein, *and by reading into a verdict something that is not there*, and in setting aside a judgment of a trial court, rendered in favor of the injured employee on the verdict of the jury, has deprived the injured employee of the right of trial by jury given him by the Congress under a Federal Statute generally known as the Federal Employers' Liability Act. (Italics ours.) (Petitioner's Brief p. 3)

By Respondent:

(1) The jury's verdict, which petitioner admits is well supported by the evidence, that the employer fur-

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nished to the employee sufficient help to do the work with safety entitled the defendant to judgment.

(2) The employer's duty is to furnish a reasonably safe method of performing the work, and the jury having found that the employer did furnish one reasonably safe method, to-wit, doing the work manually with adequate help, and that such help was available, the employer had no duty to furnish an additional safe method.

(3) Petitioner, having brought suit in the state court and having alleged that the defendant was negligent in failing *either* to furnish adequate help or proper tools, had the burden of establishing that the employer did neither, and the jury having found that adequate help was furnished, the judgment of the Court of Civil Appeals in favor of the defendant employer was correct.

(4) The construction by the Texas court of Texas pleadings, Texas jury findings, in the light of the record, is binding upon the United States Supreme Court.

(5) The only issues of negligence on the part of defendant raised by the evidence was failure to furnish sufficient help to do the work with safety and the failure to furnish supervision, and the jury having found both of these issues in favor of the defendant, the Court of Civil Appeals correctly rendered judgment, the evidence being insufficient to support the jury's finding of negligence in failing to furnish tools, and that such failure was a proximate cause of the alleged injury.

STATEMENT OF THE FACTS

The opinion of the Court of Civil Appeals contains a very detailed statement of the facts, which are largely undisputed, and the situation is so simple that we will not make a detailed statement, which would be repetitious of the Court of Civil Appeals opinion, which is printed in the record at page 177 to 191.

The following statement, which is quoted from petitioner's brief, is incomplete but not affirmatively inaccurate, and with the additions set out below, should furnish enough factual statement for this brief, since we know the Supreme Court will consider the statement of facts, which is brief, and the statement as contained in the Court of Civil Appeals opinion. We quote from petitioner's brief, from page 7 to the top of page 9:

> "Deen had worked as a coppersmith about eleven years prior to July 12, 1949, the date of his injury (R. 11). On that day a locomotive was in the shops for repair (R. 13). The assistant foreman, Mr. Williams, told him: 'I have got to have this engine today' (R. 13). Babbitt, an alloy of antimony, copper and tin, was necessary for these repairs (R. 15). The babbitt available was in a cracked pot in the furnace that leaked so badly the molten metal would put out the fire underneath (R. 15). Shortly after the assistant foreman, Williams, told Deen the locomotive had to be out that day, W. J. Bettis, Clerk to the general foreman, Johnson, told Deen in the presence of Mr. Johnson that his new babbitt pot had arrived at the freight depot, that men from the store department had gone for it and if he had

the old one off the furnace the men on arrival could assist him with the new one (R. 14, 76). The old pot weighed 250 pounds and contained solidified babbitt weighing 650 to 700 pounds (R. 18). Deen attempted to get the old pot off the furnace alone and to get the babbitt out of the old pot so that he would have everything ready for the new pot and be ready to do his part in melting the babbitt for use on the engine as soon as possible (R. 18). A crane on a pole affixed to the concrete floor with a hoist was right beside the furnace for lifting heavy objects (R. 14). The 250-pound steel pot, about a yard long, ⅔ of a yard wide, and ⅓ of a yard deep (R. 17), containing 650 to 700 pounds of babbitt, a total weight of almost half a ton, fitted so snugly in the furnace that it was necessary to pry its 1½ to 2-inch rim (R. 19), off the brick furnace a height of about an inch (R. 14) so as to allow the arms of the crane to grip it and lift it from the furnace (R. 14-15). A buggy bar or pinch bar was used by Deen to pry the pot and babbitt off the furnace so it could be gripped by an available crane (R. 14). Deen did this work alone and in the process the pot and babbitt crashed to the concrete floor (R. 15). Chance thus selected the spot on the floor where the heavy pot, with its heavier contents, was placed, although Deen testified it dropped just about where he would have set it down (R. 49). It fell upright and Deen decided that since babbitt on cooling contracts more than steel, if he could turn the pot over, the babbitt would fall out and be available for the new pot on its briefly anticipated arrival (R. 18). He struggled alone to overturn the pot but was unsuccessful (R. 18). Earl Snow, a fellow-employee, working as an acting blacksmith in the shop near-

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by, saw Deen's struggle and voluntarily came to his aid (R. 18, 19). The two tried to overturn the pot away from them but were not strong enough to do so (R. 18). Deen braced himself on the furnace (which was crowded close to the pot) and Snow on the work bench, and, by pulling the pot towards them, they were able to raise it slowly to an upright position (R. 19), when the babbitt sloughed out of the pot (R. 19) very fast (R. 97). The babbitt struck the right leg of Deen (R. 19), crippling him for life (R. 40). The customary method of handling the extraction of solidified babbitt from the steel pot had been to lift the pot and the babbitt off the furnace with the crane, as Deen did, place it on the floor, release the arms of the crane, get five or six men to come and turn the pot over manually, empty out the contracted babbitt, and then again attach the arms of the crane and hoist the pot back on the furnace (R. 52, 71, 103, 104)."

Now, the petitioner has made no attempt to refer to the testimony, which is detailed in the Court of Civil Appeals opinion, showing that the old pot had sprung a leak some three or four weeks prior to this time (a pot ordinarily lasts from five to ten years), and during the preceding two or three weeks Deen had supervised this same operation, using five or six men to help him (R. 52, 61). Where it was done with sufficient help, the "pot" was turned away from the men and, of course, the babbitt fell out without endangering anyone, and even Deen admitted that it could be done safely that way (R. 64).

Petitioner further makes no attempt to detail the evidence showing that adequate help to do the work

in safety was readily available to Deen but that he chose to attempt to do the work alone rather than doing it the customary method and in fact the only method which had ever been provided by the employer. The reason being given by petitioner being (and we quote from petitioner's brief on the merits, p. 18):

> "Since both sides accept the findings of the jury that the railway company furnished adequate help and this was negligent in not using such help and this was a proximate cause of his negligence, a summary of the evidence on these points is unnecessary."

The same statement is made by petitioner in the brief on the merits on page 11. We will, therefore, merely state that there was ample evidence to support the jury's finding that the railroad company furnished adequate help. There was, of course, evidence to the contrary, but since the jury found in favor of the defendant, and since petitioner concedes that the evidence was sufficient, perhaps it would be burdensome to here detail it.

Now, the next additional fact that should be called to the Court's attention is that, as above indicated, the *only method* provided by the defendant for doing this work was to do it manually. That is, the railroad company did not provide any other way of doing the work other than tipping the pot over manually with plenty of help. The other method suggested by the plaintiff, had never been used and was not even claimed to be safe. About this Earl Deen testified as follows (R. 58):

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"Q. All right, now, Earl, if I misquote you, please tell me; as to getting that babbitt, so far as that is concerned, you might have been able to break it with a sledge hammer or some other way, but you figured that the safest way was to turn it over?

"A. That's right.

"Q. All right; whose decision was that?

"A. I don't remember, but as well as I remember we both talked about it.

"Q. Who talked about it?

"A. Me and Earl Snow.

"Q. Well, Earl who was in charge of removing that pot and the babbitt, you or Earl Snow?

"A. I was.

"Q. Well, anyway, you agree that is the best way to do it, don't you Earl?"

"A. Yes, sir."

Plaintiff's idea was that a clamp could have been designed to be attached to the cast iron pot and then the hoist hooked to the clamp. In the record, the court reporter has sometimes referred to them as "seat clamps", sometimes as "C-clamps", and sometimes as "vice clamps". It is true that the plaintiff testified that it would be possible to conceive of some type of clamp which could be clamped on the side of this cast iron pot and then the hoist attached to the clamp, etc. (R. 75).

However, he also testified that this very procedure was unknown, had never been used, and dangerous. We quote from Deen's testimony (R. 78):

"Q. Question 189: Because of the size of the

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thing and the way it was built, the only way to get that babbitt out was to have two men get hold of it and turn it over; a third man might help, but he would not be of any help on lifting? Answer: 'Well, a man might build a vice clamp on it' and you answered that, didn't you?

"A. Yes, sir.

"Q. Question: Do you know of any device like that in use? Answer: 'No, sir' did you say that?

"A. Yes, sir.

"Q. Question 191: You know of no device that would hold it? Answer: 'We had things to lift so it could not turn or roll, that is, so long as your hoist stuck so that you can get it turned over and get the babbitt out, but you are likely (fol. 112) to throw a piece of cast iron through it; it is dangerous' did you answer that?

"A. Yes, sir.

"Q. Is that true?

"A. Yes, sir.

"Q. Now, let's get back to the matter of clamps; you had never asked anybody for clamps?

"A. No, sir."

While the designation of the record herein served on the respondent lists as Item 3 "Procedings in the Trial Court (Statement of Facts, with Clerk's Certificate, page 159)", and while in that Statement of Facts, from page 149 to 157, appears a series of pictures which explain more than 500 pages of counsel's statement, for some reason those pictures were not reproduced in the record which was delivered to respondent. Five of those pictures, being Defendant's Exhibits 1, 2, 3, 4, and 5, were taken the same day

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that plaintiff was injured, and show the babbitt pot with the piece of babbitt lying alongside of it, and the furnace with a new pot in it. These pictures were identified by the plaintiff himself (R. 52-53). We wish these had all been printed in the record or the originals had been sent up; however, reproducing them in a brief is a little difficult. Petitioner's counsel assures us that the ommission was because of the clerk's difficulty in reproducing them, and we hope that they are available to the Court.

With the permission of petitioner's counsel, we are enclosing in the flap at the back of this brief Defendant's Exhibit No. 3, which was identified as a picture of the old pot with the babbitt out of it and Mr. Snow, the employee who was helping the plaintiff when he was injured, holding it up so that the camera could look down into it. We are also enclosing with this brief, in the same flap, Defendant's Exhibit No. 5, which pretty well shows the whole layout. At the left is a picture of the babbitt furnace, with the new pot in it. In the immediate foreground is the old babbitt pot, sitting right side up, and just beyond it is the solidified babbitt, which came out and broke Deen's leg.

If, for any reason, the Supreme Court does not have the pictures which were attached to the Statement of Facts in the Court of Civil Appeals, and if the Court has any objection to using this method of presenting them, we will, of course, have them sent up or reproduced in any manner which will let the Court consider the entire record in the case.

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A very few additional undisputed facts should be added. While plaintiff did testify that there was a reason for hurrying to get the old babbitt pot out, he further admitted that, having got the old babbitt pot out and on the floor safely and without any injury to him or anyone else, the furnace was then empty, and on the arrival of the new pot from this storehouse, he and the storehouse helpers could have put in the new pot and then flopped over the old pot, taking the babbitt out of it (R. 59, 60 and 61). In other words, any hurry which there might have been was over when the babbitt pot was out and on the floor, which was prior to any injury to Deen. All he had to do was wait a few minutes and the storehouse employees would have been there with the new pot, and they and he could have put it in and flopped over the old pot without any danger to anybody. He didn't wait, and the injury resulted.

In the further interest of accuracy, petitioner's statement, in several places in the brief on the merits (for example, pages 23 and 24) to the effect that he might have been injured with adequate help, is quoted out of context. We quote from Deen's testimony (R. 62-63):

> "Q. Well, now, as to the way or method—I am asking as to the time—that particular time to get the babbitt out; that was your decision, and you said it was, and now as to the way or method of getting it out, who made the decision as to how to get it out?
>
> "A. I don't know whether it was me or Mr. Snow.

"Q. Did Mr. Snow tell you how to do it?

"A. I don't know that he did and I don't know that he didn't; but he walked over there and I know that we did discuss it.

"Q. Whose responsibility was it? As to how to get it out?

"A. Well, I suppose that it was mine, but it is very often that you will confer with your fellow man and get his opinion on anything.

"Q. Well, in any event, you either made the decision or you concurred in it, didn't you—agreed to it?

"A. Yes, sir.

"Q. No foreman told you to do it that way?

"A. No, sir.

"Q. All right; now, actually you came up with that pot, and you and Snow came up with it, you pulled with your left hand and he with his right and just before you came up with it, one of you said 'Look out for your toes, that might crush it,' or something of that sort?

"A. Yes, sir.

"Q. Then you knew if that babbitt fell out it could hurt (fol. 89) you and hurt you bad, didn't you?

"A. Yes, sir.

"Q. And you wanted it to fall out as a matter of fact, didn't you?

"A. Yes, sir.

"Q. That was what you wanted?

"A. I wanted it out.

"Q. And whether it fell out, or slumped out, you didn't know which way it would come out?

"A. No, sir.

"Q. And the strain in getting up was over before it fell on your foot?

"A. Yes, sir.

"Q. As a matter of fact, these extra men would have been helpful to you only in getting it upright, Mr. Deen?

"A. Yes, sir.

"Q. And whether there had been five or ten men there would not have had anything to do with the babbitt falling out of the pot?

"A. No, sir.

"Q. It would have fallen out if the whole shop had been there with you?

"A. It might have fell on two of us.

"Q. Yes, and your foot might have been in the same spot that it was if there had been two other people helping you with it?

"A. *No, sir.*

"(fol. 90) Q. Well, now, where we differ again, I thought I asked you about that; I hate to keep going back to this, but this is all that I know as to what you know about this, Mr. Deen. I am turning you to page 23, question 173, and starting with question 173 on page 23 of your deposition and I am going to read the question and your answer to it; question 173: 'All right, now, if you had as many as four people lifting on that pot, where would your leg have been?' Answer: 'On the other side of it, but four people, I don't believe four people could get around it in order to do much lifting.' Did you answer that?

"A. Yes, sir.

"Q. Is it true?

"A. As far as I know.

"Q. Then question 174: 'That is what you

think, as a matter of fact, you think it was a two man job?' to which you answered: 'Almost a two man job, a third may could be there and help.' Did you answer that?

"A. Yes, sir.

"Q. Is it true?

"A. Yes, sir."

Immediately following the last above quoted part, he went on to point out that the fourth man would have been more in the way than a help. We pick up with his testimony again on page 64:

"Q. All right. Let's get back to these decisions. Whose decision was it to put your foot where that would fall, if it fell it would fall on it?

"A. Mine.

"Q. All right, sir. *Now, being fair, Mr. Deen, with this jury, there wasn't anything dangerous about that, if you kept your feet out of the way, was there?*

"A. *It didn't look like it.*

"Q. All right. And, if your foot had been back, it would have fallen out just the way you wanted it to, right on the pavement, on the paved floor of that shop, wouldn't it?

"A. Yes, sir.

"Q. All right. Then the decision as to putting your foot in the way was Earl Deen's decision, was it not?

"(fol. 92) A. I suppose it was.

"Q. Well, did Mr. Snow tell you how to put your feet, or the foreman or anybody tell you how to put your feet?

"A. No, sir.

"Q. All right, sir —

"A. And nobody didn't tell me to move it.

"Q. Nobody told you to move your foot or to leave it there?

"A. That's right.

"Q. All right. *The truth about this, Mr. Deen, is that except for that one moment of forgetfulness, the kind of thing that any man could do, you or me or anybody, there wasn't anything wrong with the way that job was done that day, was there?*

"A. *It don't look to me like there was.*

"Q. All right. Outside of that one moment of forgetfulness to get your foot in the way, that was the only thing that was wrong that day; is that right?

"Mr. McCord: I object to that, your Honor, the certain words of forgetfulness; Mr. Deen hasn't testified that he forgot anything.

"Court: I overrule the objection.

"Mr. McCord: Note our exception.

"Q. There wasn't anything wrong with that operation out there that day, outside of your foot being in the way when that babbitt fell out?

"A. So far as I know.

"Q. There wasn't?

"A. That's right."

(Italics ours.)

The business about it being dangerous with four or five men meant that if Deen was going to forget and put his foot in front of it, as he did on the occasion of the injury, he would get hurt.

The petitioner violently attacks the Court of Civil

Appeals for construing the jury's verdict as establishing that the employer furnished a reasonably safe method to do the work and holding that such finding was a finding that the employer had fulfilled its duty and therefore was not negligent. However, the petitioner's attorneys have recognized that their real trouble in this case is not the Court of Civil Appeals, it is that their client, Earl Deen, had told the truth when he testified as we have quoted above, and that the truth, plus the jury findings, of course, put him out of court. We quote from the petitioner's motion for rehearing in the Court of Civil Appeals in this case (R. 197):

> *"We ask the Honorable Court of Appeals not to close the door on this plaintiff's claim even though because of innate honesty and lack of intelligence he made some general admissions that a more wily and dishonest person would not have been led into."*

This is the first time that we have ever seen an attorney apologize in an appellate court for his client's honesty. Where a truthful plaintiff has failed to convince a jury on the essential issues in his case, it cannot be grounds for giving him a new trial that, had he been willing to lie, he could have made out a stronger case. The object of a court of justice is to arrive at the truth, and if the plaintiff cannot make out a case telling the truth, he is not entitled to recover. We can admire Earl Deen because he would rather tell the truth than lie and win his law suit, and to say that his reward for telling the truth in this case was a judgment in favor of the defendant may evoke sym-

pathy. If it invokes sympathy, then it has to be on the assumption that most verdicts for employees in F.E. L.A. cases are based on perjury and that it would be a shame to let a perjurer recover and have an honest man take nothing. No court to our knowledge has endorsed this doctrine, and until there is a provision of law which entitles a man to compensation for truthfulness, it cannot be endorsed by any court.

Now, summarizing the whole thing, here was Deen, an experienced man, who was in charge of this particular operation and who was thoroughly familiar with what he had to do and how to do it. The actual operation was simplicity itself. If the Court will get the pictures out of the pocket part of this brief and particularly look at the one which is numbered Exhibit 5, it shows the babbitt furnace on the left, with the new pot sitting in it. On the floor is the old pot, and the slap of babbitt, which was, at the time Deen started, in the old pot. What Deen had to do, sooner or later, was to take the old pot out of the furnace so that the new one could be put in, and then get the babbitt out of the old pot so that the babbitt could be put into the new pot. The old babbitt pot had sprung a leak some weeks before, and he had done the same operation at least three times in the preceding three weeks, each time in the same way, except that on all of the other occasions he had had four, five or six men to help him.

On this occasion he was told by a clerk that the new pot had arrived and that the storehouse crew would be bringing it to install. Deen testified that no one told him to do the work at that particular time, and no

foreman told him specifically how to do the work at that particular time. He further testified that he knew at least as much about the job as anybody working in the shop. He went alone to the room where this babbitt furnace was, and alone, with the help of the hoist which was installed in the room, got the old babbitt pot out of the furnace and on the floor. At that time he was ready for the new pot when it arrived with the storehouse crew, and that crew would help him put it in the furnace. The old pot was on the floor, out of the way, and it could be emptied at any time. Deen, while he was waiting for the crew to show up, tried to turn the pot over alone. The actual operation of flopping the pot over is nothing more complicated than turning over any oblong object. It is just like emptying a tub or horse-trough or a vat. You merely push it away from you and roll it over where it is bottom up. That was all that Deen was going to do. He found that it was too heavy to handle by himself, and instead of asking for additional help, or instead of waiting until the storehouse crew got there, he kept on tugging, and finally Snow came over and helped him. Between them, they got the pot on edge, and, although they had said to each other, "Watch out for your toes" (R. 19), Deen hadn't got his foot out of the way, and when the babbitt fell out it fell on his leg. Deen wasn't surprised to have the babbitt come out of the pot; that is what he was trying to do. And once he got it upright, the need for additional help, of course, terminated, because the only remaining thing to do was that the babbitt would either fall out or the pot would be allowed to fall face

down, knocking the babbitt on the floor. It is true that Deen, and Snow and Anderson, plaintiff's witnesses, testified that if there had been more men available, they would have turned the pot away from the plaintiff, and therefore his foot would not have been in front of the pot, but would have been behind the pot, and the babbitt would have fallen out without striking him. But that is where the jury found against him. The jury found that the railroad company furnished Deen adequate help to do the work in reasonable safety and that he was negligent in not availing himself of that help. The method of doing the work designated by the employer was to do it manually with plenty of help, and that was the only method which the employer provided. The jury found that that was a reasonably safe way to do the work, and therefore the plaintiff lost his law suit.

The petitioner makes no attempt to indicate the evidence with reference to the man's injuries. He did have a broken leg, he got excellent medical treatment, and he was off work from July 12, 1949, until April 3, 1950 (R. 47). His actual out-of-pocket loss for the period was $2,350.00 (R. 47). He returned to work on April 3, 1950, and his testimony is (R. 47):

> "Q. All right, now, April 3, 1950, is when you went back to work?
>
> "A. Yes, sir.
>
> "Q. And this past April 3, 1954, was four years later?
>
> "A. Yes, sir.
>
> "Q. During that time, Earl, isn't—a fact that you worked pretty darned steady?

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"A. Yes, sir.

"Q. As a matter of fact, during that time, four years, other than your regular vacations—your regular days off—you had less than thirty days during the four years that you have been off the job?

"A. I am sure of that."

His wages were 50c an hour more at the time of the trial than they were at the time he got hurt (R. 48). He is, of coures, still working.

PLEADINGS AND JURY FINDINGS

Plaintiff went to trial on his First Amended Original Petition (R. 1-6). The petition was drawn in compliance with the Texas practice, and alleged the happening of the accident in detail. Throughout, the plaintiff recognized that the employer did not have to furnish both tools and sufficient help. The following quotations (italics always ours) from Paragraph IV of the plaintiff's amended petition (R. 3-4) demonstrate that beyond question:

"* * * That by virtue of such knowledge, the duty rested upon the Defendant through Plaintiff's foreman to have available to Plaintiff *proper tools* with which to remove the babbitt from said old pot, *or in the alternative sufficient help* to remove such babbitt without the use of tools, and further that the duty rested upon the store department of the Defendant to notify Plaintiff's said foreman that the new pot was being delivered for installation. * * * That because of the tremendous weight of said melting pot, the Plaintiff immediately ascertained therein *unless he had adequate*

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tools to grasp said pot and give the Plaintiff sufficient leverage to turn the pot over, or in the alternative that he have sufficient help to tip the edge of said pot over and turn the same in the direction away from the Plaintiff. * * *That because of the lack of sufficient help or sufficient tools,* it then became necessary for the plaintiff and the said Snow to grasp said pot upon its edge and pull the same towards them in order to turn the same over, and that in so doing, the babbitt fell out of said pot as the same was being turned over, striking the Plaintiff's leg about four inches above the right ankle. *That had the Plaintiff had sufficient help, to-wit, at least two other persons, to assist in turning said pot over, the (fol. 6) same could have been done by lifting the same and turning it over away from the said Plaintiff and the said Snow, but because of the negligence of the Defendant in failing to furnish sufficient help or sufficient tools to accomplish said purpose, the injuries herein set forth were received by this Plaintiff.* * * *

"A. That the Defendant was negligent in not notifying Plaintiff's foreman that the new melting pot was being sent to the roundhouse for installation, in order that said foreman would have *had proper tools as herein described* for the removing of said babbitt, *or in the alternative having sufficient help,* as herein mentioned, to remove said babbitt without the use of tools.

"B. That the Defendant was negligent in not having the foreman present and proper supervision.

"C. That the Defendant was negligent in not furnishing Plaintiff with proper tools, *as herein described,* to remove said babbitt.

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"(fol. 7) D. That Defendant was negligent in not furnishing at least two additional men to assist Plaintiff in removing the babbitt from said pot."

At the conclusion of plaintiff's evidence, the defendant rested without putting on any character of testimony (R. 113).

Now, in Texas, a damage suit, like any other civil law suit, is tried on special issues, and the Court's charge appears in the record (pages 113 to 120). These special issues are merely questions of fact, which the jury answers, based on definitions and other instructions of the Court. The substance of these findings was, as plaintiff points out (petitioner's brief, pages 5 and 6):

(1) that the defendant failed to furnish Deen proper tools, that such failure was negligence and a proximate cause of his injuries;

(2) that the railroad furnished adequate help;

(3) that the railroad furnished proper supervision;

(4) that Deen was negligent in failing to obtain additional help, which was a proximate cause of his injuries;

(5) that he was not negligent in the way and manner he did his work;

(6) that the railroad could reasonably anticipate Deen would do the work by hand;

(7) that Deen's conduct was not the sole proximate cause of his injuries;

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(8) that $39,000.00 would be "reasonable" compensation;

(9) that Deen's own negligence reduced the recovery by $17,550.00 (R. 151-154).

Both parties filed motions for judgment on the jury's verdict, and the defendant, in addition, pursuant to Texas Rules of Civil Procedure No. 301, (copied in appendix) filed an additional motion for judgment on the verdict, disregarding Issues 1, 2, and 3 therein (see Trial Court's judgment, R. 156). The Trial Court, after hearing all motions, overruled all the defendant's motions and sustained plaintiff's motion for judgment on the verdict, and entered judgment in favor of the plaintiff for $21,450.00. Appeal was duly perfected.

Defendant's pleadings (R. 6) first contained special exceptions to the plaintiff's allegations with reference to proper tools (Paragraph I), a general denial, contributory negligence, sole cause, and unavoidable accident. Petitioner states in its brief in several places (see petitioner's brief, p. 15, last paragraph, and bottom of p. 16) that the defendant did not except to the pleading of proper tools. That is not true, as shown by the defendant's answer, and also as shown by judgment of the Trial Court (R. 150), where it shows that such exception was presented and overruled by the Trial Court. As a matter of fact, merely as a matter of interest, this was assigned as error in defendant's amended motion for new trial (R. 158), and one of the points in the brief presented to the Court of Civil Appeals, which the Court of Civil Appeals did not reach.

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DECISIONS OF THE COURT OF CIVIL APPEALS AND THE SUPREME COURT OF TEXAS

Petitioner is correct in stating that we have a somewhat unusual situation here, because the opinion of the Court of Civil Appeals (R. 177 et seq.) was in favor of the defendant railroad company, and the petitioner here applied to the Supreme Court of Texas for writ of error, which was refused (R. 230). The fact that the railway company won it in the Court of Civil Appeals is unusual, but that is not what we refer to. The fact is that, although the Sureme Court of Texas did not grant a writ in the Deen case, they did, as a matter of fact, write on it in disposing of *Port Terminal Railroad Association vs. Ross*, the opinion appearing in 289 S.W.(2d) 220. This is discussed by petitioner on page 26 of their brief on the merits. The reason, of course, as petitioner shows, was that, while the Deen case was pending on motion for rehearing on the refusal of the writ, the Supreme Court of Texas had reason, in the Ross case, to indicate its specific approval of the holdings of the Court of Civil Appeals in the Deen case.

The decision of the Supreme Court of Texas with reference to the Deen case is summarized in the following quotation from *Port Terminal Railroad Association vs. Ross*, ... Tex. ....., 289 S.W.(2d) 220, quoting from page 225:

> "We agree with the Court of Civil Appeals that the verdict of the jury and the undisputed evi-

> dence establish that the railroad furnished one reasonably safe way to do the job and therefore was under no duty to furnish a second method of performing the work."

The Court of Civil Appeals gives three separate reasons for holding that the jury's verdict required entry of judgment for the defendant. The first reason was that plaintiff's pleading was that the defendant furnished neither tools or adequate help. We quote from the Court of Civil Appeals opinion (R. 181):

> "Deen pleaded that it was the company's duty to either furnish tools or additional help and the jury found that additional help was furnished and Deen was negligent in not using it."

(R. 190):

> "Deen alleged it was defendant's duty to either furnish tools or suffiicent help. His case was submitted to the jury on that theory. Deen thus assumed that if sufficient help had been furnished the babbitt could have been manually removed with safety."
>
> * * * * *
>
> "Deen alleged appellant's duty was to either furnish tools or sufficient help. He was required to prove that defendant did neither. There being a reasonably safe way to dump the babbitt without tools, appellant had no duty to furnish them for that purpose."

The second ground (R. 190) was that the evidence did not support the finding of negligence in failing to furnish tools:

> "Furthermore, there is no evidence that the additional tools suggested by Deen and Snow were in use, safe or approved. They had not thought of them (fol. 265N) before the accident. Deen testified that the clamps suggested would have been dangerous. They testified that the only way the babbitt could have been safely removed was either with their suggested appliances or manually, with adequate help. Deen testified the safest way was to tilt the pot and let the babbitt fall out. Deen and his witnesses agree that with sufficient help the pot could be tilted away from the men doing the work and the babbitt removed with safety. We sustain appellant's contention that the evidence does not support the finding that defendant was negligent in failing to furnish tools."

The last reason, of course, was that, as stated by the Supreme Court of Texas, that, whether plaintiff's pleadings bound him or not, the law was (R. 180):

> "If this contention is correct, the railway company had furnished one reasonably safe way to do the job and it had no duty to furnish a second reasonably safe way, that is, to furnish Deen with tools."
>
> * * * * *

(R. 190):

> "Under Deen's pleadings *and the law*, defendant was not required to do both. With sufficient help the babbitt could have been dumped manually with reasonable safety, therefore, there was no need, hence no duty, to also furnish tools."
> (Italics ours.)

ARGUMENT

We would like, in as concise a form as possible, to present, but not necessarily in the same order as above set out, authorities supporting the decision of the Court of Civil Appeals.

We would first like to demonstrate that the holding of the Court of Civil Appeals (which was approved by the Texas Supreme Court) to the effect that the employer, having furnished one reasonably safe way to do the work, to-wit, manually, with adequate help, had no duty to furnish an additional means, and no duty having been violated, the jury finding absolved the railroad of negligence.

We have above quoted the holding of the Court of Civil Appeals on this point, and we here quote the Supreme Court of Texas summary of that holding from *Port Terminal Railroad Association vs. Ross*, ... Tex. ....., 289 S.W.(2d) 220, quoting from page 225:

> "We agree with the Court of Civil Appeals that the verdict of the jury and the undisputed evidence establish that the railroad furnished one reasonably safe way to do the job and therefore was under no duty to furnish a second method of performing the work."

The rule announced by the Supreme Court of Texas is, of course, sound and well recognized. For general statements, we take the following from 39 *C.J.* (Master and Servant), quoting beginning at page 329:

> "[447] d. Failure to Furnish Proper and Sufficient Tools or Appliances. It is actionable neg-

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ligence on the part of a master to fail to furnish his servant with such proper tools and appliances as may be required for the reasonably safe prosecution of the work, and he cannot escape liability for failing to furnish proper safety appliances because they might have been effectual or might not have been used even if at hand. But in order to make a master liable for failure to furnish tools and appliances, *it must be shown that such tools and appliances were necessary*, and that none was at hand, although a master does not discharge his duties by having proper appliances at hand when the workmen were not allowed to use them, except by consent of their foreman. And where the lack of them arises from a temporary condition in the progress of the work caused by the negligence of fellow workmen, no liability attaches to the master. Nor is a master liable for the failure to furnish appliances to prevent an injury which could not be anticipated by the exercise or ordinary care and foresight.

"[448] 2. Nature and kind of Appliances and Places—a. In General. It is sufficient if a master furnishes his servant with reasonably safe and suitable appliances and places, and he need not furnish the most expensive, nor those of a particular kind, nor does his duty require him to provide machinery and appliances similar to those used by others, although they may be less dangerous than his own.

"[449] b. Newest, Safest, and Best Appliances and Places. *The master is not required to furnish the newest, safest, and best machinery, appliances, and places for work, but his obligations is met when he furnishes such as are reasonably safe and suitable for the purpose had in view.*

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> But in all occupations attended with great and unusual dangers, there must be used all appliances readily attainable for the prevention of accidents, and the neglect to provide such appliances is proof of culpable negligence. Under this latter rule, it is held that railroad companies are bound to avail themselves of all new inventions and improvements known to them, *whenever their utility has been thoroughly tested and demonstrated.*" (Italics ours.)

In line with the concluding portion of the above quotation, the cases in the notes to it indicate that the employer has been found negligent in using new and untested appliances and devices. 35 *Am. Jur.* (Master and Servant) contains the same language as to the general rule, and on new and novel instrumentalities, 35 *Am. Jur.*, Sec. 180, Page 609, has the following to say:

> "180. New or Novel Instrumentalities. Liability on the part of the employer is predicable of lack of care in the introduction of a novel instrumentality. Before adopting a new device, he is required to select that which seems to be the safest and most suitable for his purpose, and to consult the best available known sources of information for reliable advice as to the wisdom of the proposed experiment. A failure to take these precautions, should the device selected prove defective and an injury result from its use, will be regarded as proof of negligence."

In the Court of Civil Appeals petitioner was quite critical of the Santa Fe for using the above quotations from *Corpus Juris*, referring to it as an "old and out-

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moded work." Consequently, here we will refer to *Corpus Juris Secundum*, the volume on Master and Servant being 56 *C.J.S.*, and the statements of the rules are contained in the sections beginning with 201 on page 900. These sections of the more recent work are identical, almost word for word, with the foregoing, and we particularly refer the Court to Section 202 (the whole section), from which section we take the following quotation, (56 *C.J.S.* page 907):

> "*Momentary forgetfulness* may in an emergency excuse negligence on the part of a servant, as discussed infra § 436, but it does not create liability where the master has exercised the required degree of care for the servant's safety."

We also call particular attention to Sections 205, 206, and 207. Certainly the following quotation from Section 206 (p. 913) states the same rule as the "old" *Corpus Juris* and stated by the Texas Courts:

> "A master is not required to furnish his servant with tools, machinery, appliances, and places for work which are absolutely safe, or perfect, or most expensive, or the newest, safest and best, as discussed infra § 207, or similar to those used by others, although they may be less dangerous than his own, nor need he furnish those of a particular kind; but, broadly speaking, it is necessary for him to furnish such instrumentalities and places for work as are reasonably safe and suitable, and it is sufficient if he does so."

Without attempting to list all of the cases, or even all of the principal cases, the following decisions are certainly conclusive that, *where a jury has found* that

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the employer furnished a reasonably safe method of doing the work, he had discharged his duty to the employee under the Federal Employer's Liability Act. We list samples of the decisions by the United States Supreme Court, of various Circuit Courts, and of decisions by various State Courts, in that order:

DECISIONS OF THE SUPREME COURT:

Ellis vs. Union Pacific R. Co., 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572;

Wilkerson vs. McCarthy, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497;

Missouri-Pacific R. Co. vs. Abey, 275 U.S. 426, 48 S.Ct. 177, 72 L.Ed. 351;

Seaboard Airline vs. Horton, 233 U.S. 492, 34 S.Ct. 635, 58 L.Ed. 1062;

Hough vs. Texas Pacific RR. Co., 100 U.S. 213, 25 L.Ed. 612, 63 S.Ct. 448;

Washington & G. R. Co. vs. McDade, 135 U.S. 554, 10 S.Ct. 1044, 34 L.Ed. 235;

B. & O. R. Co. vs. Carroll, 280 U.S. 491, 50 S.Ct. 182, 74 L.Ed. 566;

Yazoo & M. V. R. Co. vs. Mullins, 249 U.S. 531, 39 S.Ct. 368, 63 L.Ed. 754;

B. & O. R. Co. vs. Groeger, 266 U.S. 521, 45 S.Ct. 169, 69 L.Ed. 419;

Chicago & N. W. R. Co. vs. Bower, 241 U.S. 470, 36 S.Ct. 624, 60 L.Ed. 1107.

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CIRCUIT COURT DECISIONS:

L. & N. R. Co. vs. Davis, (6th Cir.) 75 F.(2d) 849, Cert. den. 296 U.S. 603, 80 L.Ed. 427, 56 S.Ct. 119;

Atlantic Coast Line R. Co. vs. Dixon (5th Cir.) 189 F.(2d) 525, Cert. den. 96 L.Ed. 628, 342 U.S. 830, 96 L.Ed. 629, 72 S.Ct. 54;

Thompson vs. Penn. R. Co. (6th Cir.) 88 F. (2d) 148;

Wolfe vs. Henwood (8th Cir.) 162 F.(2d) 998, Cert. den. 332 U.S. 773, 92 L.Ed. 357, 68 S.Ct. 88;

Atlantic Coast Line R. Co. vs. Craven (4th Cir.) 185 F.(2d) 176, Cert. den. 340 U.S. 952, 95 L.Ed. 686, 71 S.Ct. 571;

Fore vs. Southern Ry. (6th Cir.) 178 F.(2d) 349;

Jackson vs. Ill. Northern R. Co. (7th Cir.) 224 F.(2d) 76;

Wadiak vs. Ill. Cent. R. Co. (7th Cir.) 208 F(2d) 925.

STATE COURT DECISIONS:

Armstrong vs. M.K.T. R. Co. (Civ.App. NRE) 233 S.W.(2d) 942;

August vs. T.&N.O. (Civ.App.-NRE) 265 S.W. (2d) 184;

Western Union Telegraph Co. vs. Coker, 146 Tex. 190, 204 S.W.(2d) 977;

Kempe vs. Illinois Central (Ia.) 232 N.W. 657;

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Truesdell vs. C. & O. Ry. Co. (Ky.) 169 S.W. 471;

Lowden vs. Bowen (Okla.) 183 Pac.(2d) 980;

Gulf, M. & N. R. Co. vs. Madden (Miss.) 200 So. 119;

Harris vs. C.N.O. & T.P. Ry. (Ky.) 197 S.W. 464;

Palmer vs. W.F. & N.W. Ry. Co. (Okla.) 159 Pac. 1115.

Petitioners place their principal reliance on *Wilkerson vs. McCarthy* (supra). In that opinion, Mr. Justice Black, for the majority, said (p. 504):

> "Much of respondents' argument here is devoted to the proposition that the Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. That proposition is correct, since the Act imposes liability only for negligent injuries. Cf. Coray v. Southern P. R. Co. 335 US p 807, ante, 363, 69 S.Ct. 29. But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances."

A little later in the opinion he says that it is up to the jury to weigh the conflicting evidence and determine whether the employer has furnished a reasonably safe way to get about his property, which would be, as applicable to the Deen case, a reasonably safe method of doing the work.

The *McCarthy* case can be distinguished on other

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grounds, of course, which are obvious from the facts themselves. However the cardinal distinction is that in the Deen case the jury made the finding that the railroad company furnished a reasonably safe way to do the work, and that petitioner was guilty of negligence in not using it. What petitioner wants the United States Supreme Court to do is to take that finding of the jury away from defendant, while admitting at the same time, as petitioner does in his brief (see p. 18), that such finding is well supported by the evidence.

> "*Since both sides accept the findings of the jury that the railway company furnished adequate help and that Deen was negligent in not using such help and this was a proximate cause of his negligence, a summary of the evidence on these points is unnecessary.*" (Italics ours.)

Does not the petitioner's admission that the jury's finding that the railroad company "furnished adequate help and that Deen was negligent in not using such help" evactly fit the requirements of Mr. Justice Douglas for a judgment in favor of the railroad in *Ellis vs. Union Pacific R. Co.* (supra). We quote from that opinion (91 L.Ed. p. 576):

> "From this evidence the jury might have concluded that petitioner had a safe place to work but elected to choose a dangerous one, that any duty of warning was fully discharged by the presence of the sign, and that the engineer had not been negligent in any way."

While, of course, petitioner has been consistent in

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claiming that he was entitled to a judgment on the jury's verdict, he has, with equal consistency, not questioned the rules of law heretofore set out.

Petitioner's primary complaint and attack on the decision of the Court of Civil Appeals is that the Court of Civil Appeals construed the findings of the jury to the effect that the defendant railway company furnished to the petitioner Deen sufficient help to do the work in reasonable safety. This holding by the Court of Civil Appeals and petitioner's attack on it are contained in the following quotation from petitioner's brief, page 15:

> "The jury did not say, and was not given an opportunity to say, that Deen was provided a safe way to do his job (R. 151-156). The Court of Civil Appeals fudged when it said:
>
> " 'We think said answers, considered in connection with the record, must be construed as a finding that sufficient men were available to help Deen remove the babbitt with safety.' (R. 181.)"

In petitioner's brief on the merits, page 4, in stating questions presented by the petitioner, they raise the same point by stating that the Court of Civil Appeals read something into the verdict that was not there. The same statement is made on page 12. On page 25 petitioner says:

> "The warping of the jury verdict by the Court of Civil Appeals of Texas in saying that it amounted to a finding that the railway company provided a safe method for Deen to do his job, was condoned by the Honorable Supreme Court of Texas."

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It is essential, therefore, we think, to demonstrate, both factually and as a matter of law, that the Court of Civil Appeals construction of the jury's finding is correct and binding on this Court.

As indicated by the foregoing quotations, the Court of Civil Appeals construed the jury's findings as being that the railroad company had furnished enough help to do the work with reasonable safety and that plaintiff was injured because of his failure to avail himself of such help.

The actual findings, which the Court of Civil Appeals had before it when it made the construction, are shown in the Court's charge (R. 115), and omitting the formal parts, we quote these issues:

> "Special Issue No. 4:
> "Do you find from a preponderance of the evidence that the Defendant failed to furnish one or more additional men to Plaintiff, other than Snow, to assist Plaintiff in removing the babbitt from the melting pot at the time and on the occasion in question
> "Answer: Yes or No.
> "Answer: No."
>
> * * * * *
>
> "Special Issue No. 7:
> "Do you find from a preponderance of the evidence that the defendant failed to give to plaintiff proper supervision at the time and on the occasion in question?
> "Answer: Yes or No.
> "Answer: No."
>
> * * * * *

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"Special Issue No. 10:
"Do you find from a preponderance of the evidence that the Plaintiff Deen was negligent in failing to obtain additional help to do the work he was doing at the time he received his injuries?
"Answer: Yes or No.
"Answer: Yes."

* * * * *

"Special Issue No. 11:
"Do you find from a preponderance of the evidence that the negligence, if any, of Plaintiff inquired about in Special Issue No. 10 was a proximate cause of his injuries?
"Answer: Yes."

The petitioner, in his brief, states many times, as he stated in the Court of Civil Appeals many times, that adding the foregoing findings together as being the equivalent of being a finding by the jury that the defendant railway company furnished adequate help to Deen to do the work involved with reasonable safety, is wrong. Petitioner nowhere has stated why it was wrong. No argument is presented, no facts are presented, and no authorities are presented.

Now, when plaintiff selected Brown County because he thought he would get a higher verdict there than in the United States District Court at San Angelo, Texas, he took both the advantages and disadvantages of the Texas practice and procedure. One of the principles of Texas practice is that the case (as any civil case) would be submitted to the jury on special issues. Some states use special findings as supplementing a general charge, and some restrict it to particular types

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or kinds of action or specific questions or matters. The practice, of course, varies from state to state, and, as far as we are aware, no state follows the same rules as Texas with reference to special issue submissions. The rules of practice and procedure in civil actions were adopted by the Supreme Court of Texas on October 29, 1940, and the sources of such rules were primarily the Texas Civil Statutes, plus the rules of decision by the appellate courts of Texas, plus an adaptation in a few instances of the federal rules, plus some original thinking by the members of the committee.

We make this statement and explanation because it must preface and excuse our discussion of the Texas practice for the submission and interpretation of special issues and special issue verdicts.

In the appendix hereto, we have copied Texas Rules of Civil Procedure Nos. 277, 279, 300 and 301. There are, of course, additional rules relating to the procedure on special issues. For example, Rule 272 provides for the submission of the proposed charge by the Court to counsel and an opportunity to object thereon, provides that "the judge shall so frame his charge as to distinctly separate questions of law from questions of fact, and not therein comment on the weight of the evidence, and so as to instruct the jury as to the law arising on the facts, and shall only submit controverted questions of fact." Rule 273 provides for the submission by the parties of special requested issues, definitions, explanatory instructions, etc. Rule 274 specifies the form for such objections and requests. Rule 275 specifies the practice with reference to read-

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ing such charge to the jury. Rule 276 covers the refusal or modification of such requested issues or instructions and the bill of exceptions in connection therewith. Rule 277 we have quoted in the appendix, and we here make only a partial quotation of it:

"RULE 277. SPECIAL ISSUES.

"In all jury cases the court may submit said cause upon special issues without request of either party, and, upon request of either party, shall submit the cause *upon special issues raised by the written pleadings* and the evidence in the case, except that, for good cause subject to review or on agreement of the parties, the court may submit the same on a general charge. Such special issues shall be submitted distinctly and separately and each issue shall be answered by the jury separately, provided that, if it be deemed advisable, the court may submit disjunctively in the same question two inconsistent issues where it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists. For example, the court may, in a workmen's compensation case, submit in one question whether the injured employee was permanently or only temporarily disabled. Where practicable, all issues should be submitted *in the affirmative and in plain and simple language.* It is proper to so frame the issue as to place the burden of proof thereon, but where, in the opinion of the court, this cannot be done without complicating the form of the issue, the burden of proof on such issue may be placed by a separate instruction thereon." (Italics ours.)

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Rule 278 was repealed March 31, 1941, and was not in effect at the time this case was tried. Rule 279 is quoted in the appendix. However, we quote here the part that we think is pertinent:

> "RULE 279. SUBMISSION OF ISSUES.
>
> "When the court submits a case upon special issues, *he shall submit the controlling issues made by the written pleadings* and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. *Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue.*" (Italics ours.)

Rules 280-299, inclusive, relate other matters. For example, Rule 290 defines a verdict as being the written decision of a jury, either by general or special verdict, and "a special verdict is one wherein the jury finds the facts only on issues made up and submitted to them under the direction of the court." Rule 300 is quoted in full in the appendix hereto, but in substance provides that where a special verdict is rendered, the court shall render judgment thereon, subject to the provisions of Rule 301. Rule 301 is quoted in full in

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the appendix, and we take therefrom what we conceive to be the pertinent part thereof:

> "RULE 301. JUDGMENTS.
>
> "The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence."

Additional references will be made where they are deemed pertinent, but we think the foregoing is sufficient, plus the authorities hereafter set out, to support what we are about to present.

As is obvious from the foregoing, the written pleadings of the parties control the issues to be submitted by the court and the form of the issues. The plaintiff is thereby given the right, subject, of course, to general principles of liability law, to direct the form in which the issues will be submitted by the way and manner in which he alleges negligence on the part of the defendant employer.

In general, the plaintiff in this case based his claim, under his pleadings (R. 1 to 5), on two acts of negligence, the first claim being that the defendant furnished neither sufficient help nor proper tools to do the work in reasonable safety, and the second being that the defendant failed to furnish proper supervi-

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sion. Below we will point out that under Texas practice, plaintiff having pleaded failure to furnish either sufficient help or proper tools, he had the burden of proving and securing findings that the defendant did neither. However, here and for the purpose of this argument only, we will deal with the point as though the plaintiff had alleged (a) failure to furnish sufficient help to do the work in reasonable safety, (b) failure to furnish tools, and (c) failure to furnish proper supervision. Those are the only three things plaintiff complains about, and the plaintiff had the choice of alleging how such negligence existed, so that he would, when the case was submitted to the jury, have the issues phrased, following his pleading in such a way as he thought they would most likely be answered in his favor. Plaintiff's pleading of negligence in failing to furnish sufficient help to do the work in reasonable safety was (R. 4):

> "That had the Plaintiff had sufficient help, to-wit, at least two other persons, to assist in turning said pot over, the same could have been done by lifting the same and turning it over away from the said Plaintiff and the said Snow, but because of the negligence of the Defendant in failing to furnish sufficient help or sufficient tools to accomplish said purpose, the injuries herein set forth were received by this Plaintiff."

And again, on the same page of the record:

> "That Defendant was negligent in not furnishing at least two additional men to assist Plaintiff in removing the babbitt from said pot."

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The Trial Court, therefore, with the approval of the plaintiff, submitted the issue of whether the defendant had furnished sufficient help to do the work in reasonable safety, in substantially the wording of plaintiff's pleading, which was Special Issue No. 4 quoted above, whereby the jury found that defendant did not fail to furnish one or more additional men to the plaintiff other than Snow to assist the plaintiff in removing the babbitt from the melting pot. Under Texas practice, the only way the Court could submit the issue of whether the defendant furnished to the plaintiff adequate help to do the work with reasonable safety was Special Issue No. 4.

That the foregoing is a correct statement of the Texas rules of practice is demonstrated, we think, by the following quotations from Texas authorities. We quote first from 41-B *Tex. Jur.* Sec. 462, p. 601:

> "§462. CONFORMITY TO PLEADINGS AND EVIDENCE—IN GENERAL.—It is clear that plaintiff must recover upon the cause of action alleged in his pleadings and he must prove the truth of those allegations. Likewise, it is familiar law that defendant is confined to such defenses as are raised by the pleadings and evidence. It follows, and it is a settled principle, that the issues submitted must conform to those raised by the pleadings and evidence. In other words the pleadings and evidence determine the form of the issues and whether they are sufficiently specific or, on the other hand, too narrow."

The next quotation is from the same volume (41-B *Tex. Jur.*—Trial) Sec. 466:

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"§466. . . . NEGLIGENCE.—The special issues should be restricted to the specific acts of negligence alleged and proven, where general averments of negligence on contributory negligence are limited and controlled by various acts specified."

The Supreme Court of Texas has many times stated the rule in substantially the same language as is contained in the following quotation from *Erisman vs. Thompson*, 140 Tex. 361, 167 S.W.(2d) 731:

"(1) Under Article 2189 it is provided that the trial court 'shall submit the cause upon special issues raised by the pleadings and the evidence in the case. Such special issues shall be submitted distinctly and separately. Each issue shall be answered * * * separately.' Under Article 2190 it is provided that the trial court, when he submits a case on special issues, 'shall submit all the issues made by the pleading and the evidence.' Both articles restrict the issues to be submitted to those raised by the pleadings and the evidence. The conjunctive conjunction 'and' is used. An issue raised by the pleadings alone cannot be submitted, and likewise an issue raised by the evidence alone cannot be submitted. Under the plain language of the two statutes, before an issue can be submitted at all it must be raised by both 'the pleading and the evidence.'

"(2-4) Independent of the above statutes, pleadings determine the issues upon which parties go to trial, and it is not even proper to admit evidence unless it is addressed to or bears upon some issue raised by the pleadings. Jordan v. Meyers, 89 Tex. 233, 24 S.W. 92; Supreme Council of the American Legion of Honor v. Anderson,

61 Tex. 296. The rule further is that allegations of the pleadings and the evidence offered thereunder must conform to each other. Golden v. Odiorne, 112 Tex. 544, 249 S.W. 822. In determining issues presesnted by a pleading, we must look thereon from the standpoint of the party against whom they are exhibited. The purpose of the pleading is to put such party on notice of the character of evidence that he will be called upon to meet. Ware v. Shafer, 88 Tex. 44, 29 S.W. 756; San Antonio & A. P. R. Co. vs. Morgan, 92 Tex. 98, 46 S.W. 28, 29.

"(5-6) Under the above rules of law the plaintiff's petition defined the cause of action this defendant was called upon to meet. Defendant had the legal right to expect the allegations of the petition and the evidence offered thereunder to coincide. Under the plain language of Articles 2189 and 2190, supra, the defendant had the right to have the issues submitted to the jury so framed as to coincide not only with the evidence, and not only with the pleadings, but with both the pleadings and the evidence. *In submitting a negligence case, the special issues should be restricted to the specific acts of negligence defined by the pleadings and supported by the evidence.* Fox v. Dallas Hotel Co., 111 Tex. 461, 240 S.W. 517; Walgreen-Texas Co. v. Shivers, 137 Tex. 493, 154 S.W.2d 625; St. Louis, S. F. & T. Ry. Co. v. Wilson, Tex.Com.App., opinion approved, 279 S.W. 808; Simmonds v. St. Louis, B. & M. Ry Co., Tex. Com. App. opinion approved 29 S.W.2d 989; Kansas City, M. & O. Ry. Co. v. Perry, Tex.Com.App. 6 S.W.2d 111.

"(7) As defined by the plaintiff's petition in this case, the defendant was called upon to de-

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fend an action wherein it was alleged in plaintiff's petition that its servants, agents and employees '*intentionally*' set afire the vegetation on its right of way. Furthermore, such petition specifically pleaded how such servants, agents and employees accomplished the act of setting such vegetation afire. *This was the cause of action the defendant was called upon to meet. Plaintiff was bound by her pleadings. The defendant had the right to have Special Issue No. 6 so framed as to submit the question only of an 'intentional' setting of the fire. Furthermore, the defendant had the right to have such issue so framed as to submit the question of the setting of such fire to the way and manner pleaded by the plaintiff.*" (Italics ours.)

The above case was decided on Articles 2189 and 2190 of the Revised Civil Statutes, which were incorporated, verbatim, in the rules heretofore quoted, as will be shown by comparison of the quotation from such statute in the opinion by the Texas Supreme Court with the language of the rules above set out.

In any event, after the adoption of the Rules of Civil Procedure, the Texas Supreme Court specifically approved the above holding as applicable to the Rules of Civil Procedure. See, for example, *Phillips vs. Burns*, 151 Tex. 614, 252 S.W.(2d) 927.

As well settled as the proposition that the issues must be submitted in conformity with the pleadings of the negligence is the further proposition that under Rule 279, above quoted, the Court cannot submit different phases of the same issue. Rule 279, above quoted (and copied in the appendix), states:

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> "Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue."

This means, of course, that, having submitted to the jury the question of whether defendant failed to furnish two additional men to the plaintiff, and the further question whether the plaintiff was negligent in not availing himself of the additional help, the submission of an issue, "Do you find from a preponderance of the evidence that the defendant railway company furnished sufficient help to the plaintiff to do the work in reasonable safety?" would be merely a different phase or version of the same issue or issues, which the Court not only didn't do, but couldn't and shouldn't have done. We quote the following from Volume 41-B, *Texas Jurisprudence* (Trial—Civil Cases) Sec. 432, page 535:

> "§423. SUBMISSION OF ISSUES IN MORE THAN ONE FORM.—The court is not required to submit an issue more than once, nor to submit the same issue affirmatively in two different forms, nor to submit issues both affirmatively and negatively for the same fact question. Nor is the court required to submit various phases or different shades of the issues. One of the purposes of this rule is to shorten a charge when it can be done without prejudice to one of the parties. Whether the issue presents only another phase must be determined under the peculiar facts of each case. The court will properly refuse requested issues that have been substantially and sufficiently covered. As to a group of facts,

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it is said that if the issue submitted necessarily directs to a consideration of and requires a decision on such group of facts, then such issue submits that group of facts, and the court may properly refuse to submit the same group of facts in different language."

The foregoing, of course, is merely a condensation of many holdings of the Texas Supreme Court. See, for example:

Solgaard vs. Texas & N.O. R. Co., 149 Tex. 181, 229, S.W.(2d) 777;

Schumacher vs. Holcomb, 142 Tex. 222, 177 S.W.(2d) 951;

Little Rock Furniture Co. vs. Dunn, 148 Tex. 197, 222 S.W.(2d) 985;

Roberts Oil Corp. vs. Garrett (Commission of Appeals) 38 S.W.(2d) 135;

Thompson vs. Hodge (Civ.App.-Wr. NRE) 237 S.W.(2d) 757;

Richardson vs. Rowland (Civ.App.-Wr. NRE) 275 S.W.(2d) 184.

Now, as indicated by the foregoing authorities, since the question of whether the defendant had failed to furnish sufficient help to do the work in reasonable safety could only be submitted once and that once in the form which plaintiff chose by the formation of plaintiff's pleadings, the necessary corollary is that the jury's negative finding, that is, its answer "No" to the special issue submitted, encompasses and is the equivalent of an affirmative finding that the defendant did furnish such help. If that were not the necessary result, then there would be no way for a court,

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under the rules above set out, to keep from submitting thousands of issues of varying phases or meanings. The latest case by the Texas Supreme Court on this very point is *Driver vs. Worth Construction Co.*, 154 Tex. 66, 273 S.W.(2d) 603, in which negative answers were held to constitute an affirmative finding that the defendant did not fail to discharge the duty he owed to the plaintiff. We quote from that opinion (273 S.W.(2d), page 608):

> "In order to properly place the burden of proof within the issue the trial court submitted the issues as to adequate warnings, etc., in the negative. Special Issue No. 1 was as follows:
>
> > 'Question: Do you find and believe from a preponderance of the evidence that at the time of and immediately before the happening in question the defendant failed to have a barricade on the new concret roadway at its intersection with Merritt street sufficient to prevent the travelling public from entering upon such road? Answer "yes" or "no".'
>
> to which the jury answered 'No'. Special Issue No. 4 was answered that it was not negligence on the part of the contractor in failing to have a flagman or watchman at the Merritt Street intersection to warn the traveling public from driving on the new concrete roadway. Special Issue No. 8 asked the jury to determine from a preponderance of the evidence if 'the defendant failed to have signs at the Merritt Street intersection sufficient to give notice to the traveling public that the new concrete roadway was not open to traffic'. The jury answered 'No' to Special Issue No. 11 which inquired by appropriate language if 'the defendant failed to have flares

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at the Merritt Street intersection sufficient to give notice to the traveling public not to enter upon the new concrete roadway'.

"Thus the jury found that the contractor did not fail to discharge the duty he owed to give notice to the traveling public not to enter upon the new concrete roadway." (Italics ours.)

In our case, Deen formulated the issues on failing to furnish sufficient help to do the work in reasonable safety by his pleadings, and Deen did not object to their form. He is, therefore, in no position now to contend they do not encompass the finding, as the Court of Civil Appeals held they did, that the defendant furnished to Deen sufficient help to do the work in reasonable safety.

Now, the plaintiff has conceded (see petitioner's brief, pages 11 and 18, for example) that there was ample evidence that the railway furnished adequate help and that Deen was negligent in failing to use the available help. Petitioner's concession, on page 11, being in the following language:

"The jury found in favor of the railway on issues as to whether the railway failed to furnish adequate help, whether Deen was negligent in his failure to use available help and whether this was a proximate cause of his injuries (R. 151, 153). Both sides in this Court *concede the evidence on these issues was conflicting and cannot be disturbed by an appellate court.* (Italics ours.)

Petitioner concedes that this Court cannot disurb the jury's findings on such issue. Can, or should, this Court disurb the Court of Civil Appeals construction

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of such issues by applying the rules of Texas procedure above set out and the Texas decisions with regard to Texas practice? In the petition for certiorari in this case (see, for example, pages 23 and 24) and in petitioner's "brief on the merits" (page 25 et seq.) he has violently attacked the Texas courts, particularly the Supreme Court, claiming that in this and other cases the Supreme Court of Texas has disregarded the Federal Employers' Liability Act and the decisions of the Supreme Court of the United States.

The Supreme Court of Texas has several times stated the principles on which it handles appeals on cases tried under the Federal Employers' Liability Act (whether it is a Jones Act sailor or an F.E.L.A. railroad man). We quote from *Hopson vs. Gulf Oil Corp.*, 150 Tex. 1, 237 S.W.(2d) 352, quoting from page 358:

> "Relying on recent decision of the Supreme Court of the United States, which manifest a tendency to sustain on very little evidence verdicts of juries in suits brought under the Jones Act and under the Federal Employers' Liability Act, petitioner in effect *takes the position that the established practice in this state should be disregarded* and that judgment should be rendered here on the jury's verdict. Among other authorities petitioner cites Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916, and Wilkerson v. McCarthy, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497. But neither of those decisions nor any other that we have found is authority for departure, in a suit under the Jones Act or under the Federal Employers' Liability Act, from our settled rules of procedure. *By the institution of*

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> *his suit petitioner invoked the jurisdicition of the state courts and the suit should be tried as any other suit for damages for negligence is tried in the state courts, provided there is compliance with the specific requirements of the Federal Statutes, that is to say,* that assumed risk and negligence of fellow servants are not to be defenses and contributory negligence not a complete defense, *and that the injured seaman or employee is entitled to trial by jury.* (Italics ours.)

The same statement is contained in the later case of *Socony Vacuum Oil Co. vs. Aderhold*, 150 Tex. 292, 240 S.W.(2d) 751.

Like the Supreme Court of Texas, we know of no decision by the United States Supreme Court contrary to the rule stated by the Supreme Court of Texas. And we find nothing in *Brown vs. Western Railway of Alabama*, 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100, to the contrary.

Now, however, should the United States Supreme Court desire to go into the question, as invited by the petitioner here, of whether the Texas Court of Civil Appeals and the Texas Supreme Court correctly applied Texas rules of practice and procedure to the jury's verdict in this case, we cannot see how this Court would come up with any different answer.

The Court of Civil Appeals has carefully detailed much evidence. And, as a matter of fact, we do not believe that any experienced judge or any experienced trial lawyer could read the statement of facts in this case and not know that the real fight in this case was over the question of the failure of the defendant to

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furnish sufficient help to do the work in reasonable safety. It sticks out on every page and every question. The plaintiff claimed that he didn't have enough help and it wouldn't have been furnished to him if he had asked for it, because it had been refused him on other occasions and because his helper had been taken away from him. The defendant proved that help was in the neighborhood and that he could have had it had he asked for it, and that on at least three prior occasions he had asked for it and had been furnished it to do this very work, and when he had the help it was done in safety with all feet behind the pot, and no danger to anyone.

It is true that the railroad contended that if plaintiff was going to forget and put his leg in front, where the babbitt would fall on it and where he knew the babbitt was going to fall, because that was what he was trying to accomplish, the furnishing of six men wouldn't have prevented the accident. Neither would the furnishing of tools, clamps, or whatnot. In other words, if plaintiff was going to put his leg in the place where he knew the babbitt was going to fall (whether negligently or merely because of mementary forgetfulness), he was going to get his leg broken, whether the work was done by six men, by a lifting device, or any other way. By quoting testimony out of context, the petitioner has sought to imply in this Court that the railroad company was contending in the Trial Court that plaintiff would have got his leg broken whether there were six men helping him or whether he had all the tools in the world. The defendant contended that nothing would be safe if the plaintiff put

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his foot in front of something he knew was about to fall. In other words, that the plaintiff had to exercise some care for his own safety, and if he did not, no method would have protected him. No contention was made by the defendant that the work couldn't be done with safety with adequate men.

All of the foregoing, we think, can be summarized in the following statement:

The jury found, on what petitioner admits was ample evidence, that the railroad company furnished Deen adequate help to do the work in reasonable safety.

Without getting to any question of whether Deen was bound by his pleading that the railroad company furnished neither adequate help nor proper tools, it is obvious that the Court of Civil Appeals decision was correct, because Deen got his jury trial and the jury found that the employer furnished him a reasonably safe method of doing the work, to-wit, by hand with adequate help. Having furnished Deen a reasonably safe way to do the work, it had fulfilled its duty, and having fulfilled its duty, it could not be held guilty of negligence.

Quoting from 35 *Am. Jur.* (Master and Servant) Sec. 121, p. 550:

> "It is elemental in every case involving the liability of an employer for an injury to his employee that in the absence of some special contract or statute expressly providing therefor, there can be no recovery unless the master has been negligent,—has been guilty of some breach of duty owing by him to the servant."

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Texas courts have stated the same proposition many times. For example, we quote from *Westbrook vs. Watts* (Civ.App.-NRE) 268 S.W.(2d) 694, at page 697:

> "It is an elementary principle of the law that negligence is a failure to observe a legal duty, and when no duty exists, no legal liability can arise on account of negligence."

The Supreme Court of the United States has used almost the identical language above quoted any number of times. The following cases are illustrative only:

> *Northern Pacific R. Co. vs. Adams*, 192 U.S. 440, 24 S.Ct. 408, 48 L.Ed. 513;
> *Northern R. Co. vs. Page*, 274 U.S. 65, 71 L.Ed. 929, 47 S.Ct. 491;
> *N.Y.C. R. Co. vs. White*, 243 U.S. 188, 61 L.E. 667, 37 S.Ct. 247.

Obviously, if the master's duty is to furnish a reasonably safe way to do the work, and a jury finds that the railroad company has furnished a reasonably safe way to do the work, the duty has been fulfilled, and there is no duty to furnish an additional method. Put another way, if the work could be done with reasonable safety with no tools, there was no necessity or duty to furnish tools. Quoting a portion of the quotation we have heretofore made from 39 *Corpus Juris*, Sec. 447:

> "In order to make a master liable for failure to furnish tools and appliances, it must be shown that such tools and appliances were necessary."

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What this Court has many times said is that the master must exercise ordinary care to furnish the employee with a reasonably safe place to work and a reasonably safe method to accomplish his work, and to require that its work be carried on in a reasonably safe manner. There is no decision of this Court that, *where a jury* has found that the employer furnished the employee with a reasonably safe method of accomplishing the work, the employer has an additional duty to find and furnish additional ways and methods by which the work might be done with safety.

Let us emphasize, before leaving this portion of the argument, that this is not a case, although the petitioner (see brief on the merits, pages 29 and 30) implies it is by citing *Wilkerson vs. McCarthy*, 93 L.Ed. 497, 366 U.S. 53, 69 S.Ct. 413, and *Virginia Ry. Co. vs. Viars* (4th Cir.) 193 F.(2d) 547, where the defendant furnished two ways to do the work, one safe and one unsafe. In the Wilkerson case, the employer had furnished a longer and safer route, and a short and dangerous route. The real issue in the Wilkerson case was whether the employer had adequately and consistently prohibited and prevented the use of the dangerous and shorter route. In the Wilkerson case, *there was no jury finding that the employer had furnished a reasonably safe way to do the work.* In the Viars case, there were several ways of doing the work furnished. One included dynamite, which method was found to be dangerous.

Deen was not furnished but one way to do the work, that is, manually with plenty of help. And the jury found, contrary to his evidence and his contention,

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that the railroad furnished him adequate help to do the work in safety. And therefore, the petitioner is asking this Court to hold:

> "Where the only method of doing the work provided by the employer is manual, and a jury, on adequate evidence, finds that sufficient man power was furnished by the employer to do the work in reasonable safety, the employer may nevertheless be held liable for not devising or designing some untried equipment, which might have enabled the plaintiff to perform the same job as safely as he could have done it with the help which was readily available to him."

The plaintiff has not been deprived of any jury trial. As a matter of fact, what he is asking the Supreme Court of the United States to do is to deprive the defendant railway of a jury trial by taking away from the railroad company the jury's findings that Deen was furnished a reasonably safe way to do his work.

We think the foregoing certainly should dispose of this case, without the Court getting into the Texas rules of pleadings. However, as indicated in the foregoing statement of holdings by the Court of Civil Appeals, an additional reason given by the Court of Civil Appeals was that Deen, under his pleading, having alleged that the defendant should have furnished either sufficient help or proper tools to do the work in reasonable safety, had the burden of proving that the defendant did neither. The Court of Civil Appeals said (R. 190):

> "Deen alleged it was defendant's duty to either

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> furnish tools or sufficient help. His case was submitted to the jury on that theory. Deen thus assumed that if sufficient help had been furnished, the babbitt could have been manually removed with safety."

And further (R. 190):

> "Deen alleged appellant's duty was to either furnish tools or sufficient help. He was required to prove that defendant did neither."

In the Court of Civil Appeals opinion and in the earlier portion of this prief (p. 21) we have quoted Deen's pleading showing that he alleged that the defendant should have furnished either sufficient help or proper tools to do the work with safety. Under Texas practice, he is bound by that pleading and, as the Court of Civil Appeals held he had to prove that the defendant did neither, and a jury finding that the defendant did either absolved it of liablity.

The best evidence, of course, that that is a correct rule of Texas practice is that the Court of Civil Appeals so held in this very case, and the Supreme Court of Texas refused a writ of error. In this case, the refusal of a writ of error included an express approval by the Supreme Court of the Court of Civil Appeals opinion because of the peculiar circumstances that the Supreme Court of Texas actually decided the Deen case when it wrote upon the Deen case in its decision in *Port Terminal Railroad vs. Ross*, which we have heretofore referred to (see 289 S.W.(2d) 220).

Secondary evidence of the correctness of the proposition that under Texas practice of plaintiff who

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pleads must secure a jury finding to support the pleading, and is bound by such pleading, is the quotation we have heretofore made from *Erisman vs. Thompson*, 140 Tex. 361, 167 S.W.(2d) 731, and we only repeat the concluding portion of such quotation from 167 S.W.(2d) p. 733:

> "(7) As defined by the plaintiff's petition in this case, the defendant was called upon to defend an action wherein it was alleged in plaintiff's petition that its servants, agents and employees '*intentionally*' set afire the vegetation on its right of way. Furthermore, such petition specifically pleaded how such servants, agents and employees accomplished the act of setting such vegetation afire. *This was the cause of action the defendant was called upon to meet. Plaintiff was bound by her pleadings. The defendant had the right to have Special Issue No. 6 so framed as to submit the question only of an 'intentional' setting of the fire. Furthermore, the defendant had the right to have such issue so framed as to submit the question of the setting of such fire to the way and manner pleaded by the plaintiff.*" (Italics ours.)

Additional Texas decisions (but far, far from an exhaustive list) are:

P. & S.F. Ry. vs. Ray (Civ.App.-NRE) 221 S.W.(2d) 936;
Blickman vs. Chilton (Civ.App.-No Writ) 114 S.W.(2d) 646;
Texas Employers Ins. Co. vs. Dillingham (Wr.-NRE) 262 S.W.(2d) 748;
Martin vs. Kyser (Wr. dis.) 104 S.W.(2d) 592.

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The foregoing is not an unreasonable rule of practice. The following are merely examples. A plaintiff alleges that a railroad company should have had either a wigwag or a crossing flagman at an intersection. Obviously, if the railroad company gets a jury finding that it had either a crossing flagman or a wigwag, it has secured a jury finding that it was not guilty of the negligence charged. An employer is charged with negligence in failing to furnish the employee with either a chisel or a screw driver to take the lid off a paint can. If the jury finds, on adequate evidence, that the defendant furnished the plaintiff a screw driver, the jury has found that the defendant was not negligent as charged. Plaintiff alleges that if the defendant in an automobile intersection collision had either slowed down or pulled to the right, the accident would not have happened and the defendant was negligent in failing to either pull to the right or slow down. If a jury finds that the defendant pulled to the right in plenty of time, it is a jury finding that the defendant was not guilty of the negligence charged. The foregoing are all actual cases, and they can be multiplied indefinitely.

It may be that this Court prefers the trial of cases under the Federal Rules of Civil Procedure. It may be that the plaintiff, had he chosen to file this suit in the United States District Court where it would have been tried on a general charge, might have won it. But the plaintiff in this case elected his home county and the state court, and with no belligerence intended, certainly Congress has not enacted any statute which makes the Federal Rules of Civil Procedure the gov-

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erning principles for the trial of an F.E.L.A. case in the District Court of Brown County, Texas. We do not understand that any decision of this Court has so indicated.

No matter whether this Court approve or not approve of the Texas practice, no one can say that the plaintiff in this case was deprived of a jury trial by reason of the Texas practice. Plaintiff got his jury trial, and the jury brought in a verdict. The most plaintiff can say, and the most this Court can say, is that the Texas Court of Civil Appeals erred in applying principles of Texas practice to a trial before a Texas jury and to the special issues verdict that a Texas jury returned.

We do not think we ever get to the question of whether the Court is going to decide the case on a principle of Texas pleading and practice. Because unquestionably the plaintiff had a jury trial, and unquestionably the jury found that the defendant furnished him a reasonably safe way to do the work. Put another way, the jury found that the only method furnished by the defendant to do the work was reasonably safe. And that, of course, was a full discharge of the defendant's duty and obligation to the plaintiff, and absolved the defendant of negligence.

However, if this Court wants to go into the matter of Texas practice, then we next come to Texas Rules of Civil Procedure 301, which is copied in full in the appendix.

The pertinent portion of such rule (which is merely

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Article 2211 of the Revised Civil Statutes of Texas carried forward verbatim) is as follows:

> "RULE 301. JUDGMENTS.
>
> "The judgment of the court *shall conform to the pleadings, the nature of the case proved and the verdict,* if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity." (Italics ours.)

Under the above rule, the Trial Court had the obligation of rendering such judgment as conformed to the pleadings, the case proved, and the verdict. The judgment could not conform to only the case proved, nor could it conform only to the verdict. The judgment had to conform to all three. The error in this case by the Trial Court was failing to properly apply Rule 301 to the pleadings, to the proof, and to the jury's verdict. That was why the case was appealed to the Court of Civil Appeals and why the Court of Civil Appeals reversed it.

Under the foregoing rule (and the statute which preceded it and contained the same language), the Trial Court, or on appeal the Appellate Court, must disregard, as immaterial, findings of the jury which are not supported by *both* the pleadings and the evidence, or which are immaterial as a matter of law. Again, the following citations, since we anticipate the petitioner can furnish none to the contrary, are illustrative rather than an exhaustive list of the authorities which might be presented:

> *Sawyer vs. City of San Antonio,* 149 Tex. 408, 234 S.W.(2d) 398;

Starr vs. Ferguson, 140 Tex. 80, 166 S.W.(2d) 130;

Whittenburg vs. Miller, 139 Tex. 586, 164 S.W. (2d) 497;

Sproles vs. Rosen, 126 Tex. 51, 84 S.W.(2d) 1001;

Rich vs. Western Union Tel. Co., 101 Tex. 466, 108 S.W. 1152;

Hargrove vs. Trinity Universal Ins. Co., 152 Tex. 243, 256 S.W.(2d) 73.

We think the following quotation from 41-B *Tex. Jur.* (Trial—Civil Cases) Sec. 591, page 819, correctly states the rule in Texas:

> "§591. IMMATERIAL AND IRRELEVANT FINDINGS.—A verdict based on an authorized submission is necessarily comprehended by the rule that the judgment must conform to the pleadings, the nature of the case proved, and the verdict of the jury,—a rule which is completely covered in another article. While it is said that the judge has no power to override the verdict and to render a judgment contrary thereto upon any issue in the case, this rule does not apply where the issues on questions of law should not be submitted, but, if submitted, the answers of the jury thereto may be disregarded by the trial court. And if a special issue is erroneously submitted, the jury's answer should be ignored by the court. If, by ignoring the answers to immaterial issues and considering answers to material issues, the court can render a judgment on the material issues answered, such judgment is not rendered non obstante veredicto."

Rule 301, as quoted in full in the appendix, also

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provides for motions to disregard any issues which are immaterial or which are not supported by the evidence. Such motion, of course, was made in this case in the Trial Court and was sustained by the Court of Civil Appeals. For a statement of a synopsis of the Texas decisions on the same, we quote from 41-B *Tex. Jur.* (Trial—Civil Cases) Sec. 592, page 821:

> "Findings upon issues as to which there is no evidence and upon issues established by the un-uncontroverted evidence are not required to be embraced in the veredict. Independently of the rule, *the court is authorized to ignore a finding* that has no support in the pleading or evidence, or a finding *which, in view of findings on other issues, is immaterial.* If there is no dispute, no issuable fact is presented. But, the question being submitted to, and erroneously found by, the jury against undisputed evidence, the court is authorized to ignore the finding and render judgment according to the undisputed evidence." (Italics ours.)

A few of the decisions applying the foregoing rules are:

Texas and N. O. R. Co. vs. Blake (Civ.App.-Wr.ref.) 175 S.W.(2d) 683;

Reddick vs. Longacre (Civ.App.-Wr.ref) 222 S.W.(2d) 399;

Miller vs. Lemm (Commission of Appeals) 276 S.W. 211;

Clock vs. Dowd (Commission of Appeals) 280 S.W. 194;

Johnson Aircraft vs. Wilburn (Civ.App.-No Writ) 190 S.W. 426.

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Repeating then, the Trial Court had the duty of entering judgment in accordance with the pleadings, the evidence, and the jury's findings to the special issues. On appeal, the Court of Civil Appeals, of course, has the right to review the correctness of a Trial Court's judgment, and if the Trial Court did not enter the proper judgment based on the pleadings, the evidence, and the jury's verdict, the Court of Civil Appeals has the duty and obligation of reversing and rendering the correct judgment. That is what was done in this case, and that is what the petitioner has appealed to the Supreme Court of the United States for relief against. We suppose petitioner is asking this Court to review the correctness of the decision of the Court of Civil Appeals in construing the pleadings, the evidence, and the jury's findings, and to substitute its construction of the Texas pleading, the Texas evidence, the Texas special issue verdict, and enter such judgment as it deems required under Rule 301. If this Honorable Court applies the Texas rules of practice and procedure and follows the Texas decisions thereon with reference to practice and procedure, it will affirm the Court of Civil Appeals judgment in this case.

Lastly, the Court of Civil Appeals judgment was correct, disregarding all of the matters heretofore presented, because the evidence was insufficient to support a finding of negligence in failing to furnish the "I" clamps or "C" clamps which plaintiff invented on the witness stand.

We only reach this point after the Supreme Court of the United States has held that the employer must

furnish several safe ways to do the work. After the Supreme Court has held that, where a jury has found that the employer furnished a reasonably safe way of doing the work and the employee negligently failed to use that method, the employer can still be held liable if there was another way of doing the work which the employer did not furnish but under which the work might have been done at least as safely as the method which the employer did furnish.

The Supreme Court of the United States only reaches this point, after it decides that the case tried in a Texas District Court is not governed or controlled by Texas rules of procedure relating to pleading, jury findings, etc.

Since it is almost inconceivable that this Court is going to hold that the employer has to furnish several safe ways to do the same job, and hold that a plaintiff who selects a Texas court to try his F.E.L.A. case in is to have the benefit of the Federal Rules of Procedure or otherwise not be bound by the rules of practice of that court, we are not going to elaborate extensively on the lack of evidence. The Court of Civil Appeals has set out, and we will here pick the essence of it in four short quotations. The only tools the absence of which plaintiff complains, was failure to design some type of "C" clamp or "I" clamp, and this is the way the plaintiff's testimony reads (R. 70):

> "Q. Now with reference to the equipment and tools which you had available out there, in the shop at the time and on the occasion in question, was there any other type of tool or equipment,

other than what was made available to you that could have done this job?

"A. Yes sir. I think *I could have designed within a period of a short time*, designed several tools that would do the job, even by myself.

"Q. What particular tool or equipment could have been furnished you that was not furnished you at the time and on the occasion in question?

"A. Well, right on the spur of the moment a person could have taken two C clamps with a chain attached to both, clamping them both on the same side of the pot, at each end, using a chain hoist to hook into the chain in a loop, lifting the pot up gently on its side—of course it would have balanced straight up; but you could have been on the back side of it and one end would have tilted it away from you very easily, and lowered it very slowly with the other hand. The hoist is a heavy enough hoist that you could lift much more load than that with one finger, if you could hook the finger in the chain link; but it operates very easy under that amount of load; and by tilting the pot away from you, if the babbitt falls out, or the pot fell over, it would fall on the floor and not on you." (Italics ours.)

Also quoting from Deen's testimony (R. 77):

"Q. Mr. Deen, these seat clamps you are talking about, have you—or did you ever use them these other times when you removed the pot?

"A. No, sir.

"Q. Did you ever discuss the need for them with Williams or Johnson to remove this pot?

"A. No, sir.

"Q. As a matter of fact, that is just some

theory of yours that you have developed recently isn't it. Mr. Deen?

"A. No, sir.

"Q. Well, when I took your deposition, I asked you if there was any kind of a device that would handle that, and you told me not that you knew of; didn't you?

"A. I didn't tell you that I couldn't have figured out one if I had had to figure out one.

"Q. All right, did you tell me if you tried to clamp on to it, it would be dangerous, and might bust that cast iron and damage or injure somebody?

"A. It is possible, but not probable."

Again quoting Deen (R. 78):

"Q. Question 191: You know of no device that would hold it? Answer: 'We had things to lift so it could not turn or roll, that is, so long as your hoist stuck so that you can get it turned over and get the babbitt out, but you are likely to throw a piece of cast iron through it; it is dangerous.' Did you answer that?

"A. Yes, sir.

"Q. Is that true?

"A. Yes, sir."

Again quoting from Deen's testimony (R. 82):

"Q. When I asked you about designing something, all that you could think of was the clamps and that would be dangerous, wasn't that your testimony?

"A. Yes, sir."

Petitioner cannot add all of the testimony with reference to "C" clamps, seat clamps, or "I" clamps together and add it up to amount to more than plaintiff's invention on the witness stand of a theory or method, which might or might not work, and which he admitted was likely to be dangerous. There is no evidence that it would work. The system was invented on the witness stand, and no one had ever tried it out. No court would be quicker to condemn a railroad company for using a method or equipment which was untried and untested than the United States Supreme Court. Even if there were no evidence that such method was dangerous, this Court would have held the Gulf, Colorado and Santa Fe Railway Company guilty of negligence for using an untested means or method.

Of course, that has always been a sound principle of law, to-wit, that the master is negligent if he uses a novel method or novel instrumentality without testing it or determining whether it would or would not work. We quote from 35 *Am. Jur.*, Sec. 180, p. 609:

> "180. New or Novel Instrumentalities. Liability on the part of the employer is predicable of lack of care in the introduction of a novel instrumentality. Before adopting a new device, he is required to select that which seems to be the safest and most suitable for his purpose, and to consult the best available known sources of information for reliable advice as to the wisdom of the proposed experiment. A failure to take these precautions, should the device selected prove defective and injury result from its use, will be regarded as proof of negligence."

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Or, as it is put in 56 *C.J.S.*, Sec. 208, p. 916:

> "An employer before adopting and installing a new and untried appliance is required to select that which seems to be the safest and most suitable for his purpose, and to consult the best available known sources of information for reliable advice as to the wisdom of the proposed experiment."

Turning the same proposition around and stating it the other way, the master cannot be held negligent for failing to use a different method if the prior method was reasonably safe. Or, as it is stated in 56 *C.J.S.*, Sec. 226, p. 952:

> "The carrier is not required to furnish the latest, best, and safest appliances, or to discard standard appliances, reasonably safe and suitable or efficient, on the discovery of later improvements."

Another statement of the same proposition, which seemed peculiarly applicable in view of the untested and probably dangerous character of the suggested method, is taken from 65 *C.J.S.*, Sec. 2, p. 330:

> "i. POSSIBILITY OF SAFER METHOD.
>
> "*The fact that there may have been a safer method than that employed, or that danger might have been avoided by action in a different manner, does not make an act negligent.*
>
> "If one has acted with ordinary prudence and judgment, he is not negligent even though danger might have been avoided, if he had acted in a different manner, and, hence, the doing of an act in a certain manner is not necessarily negligent merely because there may have been a safer man-

> ner of doing it. A fortiori, in the absence of a fixed duty, negligence cannot be inferred from failure to do an act in some other way not shown to be safer than the way in which it was done, and, when prudent men differ as to which of two courses is safer, negligence cannot be predicated on the adoption of either."

Now, we have in this case, in addition to the fact that the plaintiff invented them from the witness stand and didn't know whether it would work or not work, the fact that he testified at least three times that such method could be dangerous. Of course, as he points out, the pot is cast iron, and when you clamp onto cast iron and lift, the probabilities are that the cast iron will fracture and the piece pull out or be thrown out. No matter how dangerous plaintiff says it was when he testified, his attorneys now say that the railroad company was guilty of negligence in failing to furnish him an untested and untried clamp, which evidence shows very probably would have been dangerous.

The only real argument which petitioner asserts to support such an absurd proposition is, "The railway company's silence materially strengthens the probative force of the evidence offered by Deen," (petitioner's brief, p. 20). Of course, it is true that there are cases which hold that the failure of a defendant, in presenting its evidence, to controvert statements or assertions of plaintiff's witnesses adds some weight to the testimony of such witnesses. These, however, are all cases where the defendant actually puts on evidence. In the case at bar, the defendant put on no evidence

whatsoever, and rested when the plaintiff did. Under such circumstances, no presumption exists, and appellee's authorities are inapplicable. We quote from 22 *C.J.*, Sec. 56, p. 120:

> "Where a party calls no witness, but submits his case in reliance upon the insufficiency of his adversary's evidence no unfavorable inference arises from his failure to call witnesses having special knowledge."

The above rule was applied by the Texas Supreme Court in the case of *T. & P. Railway Company vs. Shoemaker*, 98 Tex. 451. See page 456. See also, *G. H. & S. vs. Landeros*, (Civ. App.), 264 S.W. 524, and *Turner vs. Texas Company* (Texas Sup. Ct.) 159 S.W.(2d) 112.

The most that can be said, under any circumstances, is that the defendant had furnished one reasonably safe method to do the work, to-wit, manually with plenty of help. Now, with that being established by the jury's finding, does the plaintiff, in the face of that finding, raise an issue of fact on the defendant's negligence by testifying that another method might have been designed which might work and which might be safe or might be dangerous?

Therefore, we say, even if the Supreme Court of the United States were to hold that every point here presented and every point on which the Court of Civil Appeals based its decision was wrong, nevertheless, under the plaintiff's own evidence in this case, there was no issue of negligence to be submitted to the jury except the failure to furnish supervision and the fail-

ure to furnish him sufficient help. Those two were submitted to the jury and were answered against him.

Let us repeat again, there is no issue before this Court but that the evidence justified the submission of the negligence on the part of the employer in failing to furnish sufficient help to do the work in safety. There is no issue before this Court but that the evidence justified the submission to the jury of the issue of whether the employer failed to furnish proper supervision. Both of those issues were submitted to the jury and found in favor of the defendant. The defendant furnished adequate help to do the work in safety, and the defendant furnished adequate supervision. Now, in the light of those findings, and the evidence supports each of them, as petitioner admits, can this Court say that there was evidence to support a finding of negligence in failing to furnish an untested, untried and unsafe tool or appliance?

SUMMARY

We would like to summarize this whole case again by referring to petitioner's fundamental proposition. On page 3 of petitioner's brief on the merits, he states that the only question presented is whether the Court of Civil Appeals in this case, in construing the pleadings, the evidence, and the jury finding as requiring a judgment for the defendant "has deprived the injured employee of the right of trial by jury given him by the Congress under a Federal Statute generally known as the Federal Employers' Liability Act."

We summarize our answer to that by stating again

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that the plaintiff in this case had a jury trial. He had a jury trial in the District Court of Brown County, Texas. He selected that court, and he had that trial under Texas form of pleadings, as he wanted it. He had it under Texas rules of evidence, as he wanted it. He had a trial according to the Texas rules of civil procedure, and that meant special issues, and that was the way he wanted it. He had a jury trial, and under Texas practice he tried it on special issues. The jury found the essential issues of fact against him, and the Court of Civil Appeals so held.

Nobody has deprived the plaintiff of a jury trial. What the plaintiff in this case wants the United States Supreme Court to do is to deprive the defendant railway company of a jury verdict in its favor.

In attempting to obscure the proposition that the Supreme Court of the United States is asked to take a jury verdict away from the defendant, the petitioner has (see petitioner's brief on the merits, p. 33) made a vicious attack on the Supreme Court of Texas and demanded that the United States Supreme Court chastise the Supreme Court of Texas for exercising the jurisdiction given to it by the Constitution of the State of Texas. That is not what is involved here. What is involved here is a plaintiff who was willing to tell the truth about how he got hurt, and he lost his law suit before a jury. Now, the petitioner does not contend in so many words that the Federal Employers' Liability Act guarantees that a plaintiff will recover, but that is what he is asking this Court to hold, no matter what the jury found.

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CONCLUSION

It is the prayer of the respondent, Gulf, Colorado and Santa Fe Railway Company, that this Court, on further consideration, dismiss certiorari as having been improvidently granted; or in the alternative that the judgment of the Court of Civil Appeals be in all things affirmed, or in the event that there is any portion of the opinion or decision or judgment of the Court of Civil Appeals which this Court does not approve, that all matters presented to the Court of Civil Appeals be considered in this Court, and all assignments of error there presented be thoroughly considered and decided.

Respectively submitted,

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I certify that a copy of this brief has been mailed on the ..... day of February, 1957, to petitioner's attorneys, David C. McCord, 519 Mercantile Bank Building, Dallas 1, Texas, and to Robert Lee Guthrie, 1608 Mercantile Bank Building, Dallas 1, Texas.

APPENDIX

RULE 277. SPECIAL ISSUES.

In all jury cases the court may submit said cause upon special issues without request of either party, and, upon request of either party, shall submit the cause upon special issues raised by the written pleadings and the evidence in the case, except that, for good cause subject to review or on agreement of the parties, the court may submit the same on a general charge. Such special issues shall be submitted distinctly and separately and each issue shall be answered by the jury separately, provided that, if it be deemed advisable, the court may submit disjunctively in the same question two inconsistent issues where it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists. For example, the court may, in a workmen's compensation case, submit in one question whether the injured employee was permanently or only temporarily disabled. Where practicable, all issues should be submitted in the affirmative and in plain and simple language. It is proper to so frame the issue as to place the burden of proof thereon, but where, in the opinion of the court, this cannot be done without complicating the form of the issue, the burden of proof on such issue may be placed by a separate instruction thereon. In submitting special issues the court shall submit such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues, and in such instances the charge shall not be subject to the objection that it is a general charge. If the nature of the suit is such that it cannot be

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determined on the submission of special issues, the court may refuse the request to do so, but the action of the court in refusing may be reviewed on proper exception in the appellate court, and this rule shall be construed in connection with the succeeding rule. Amended by order of March 31, 1941.

RULE 279. SUBMISSION OF ISSUES.

When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be demed a ground for reversal of the judgment unless a substantially correct

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definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.

RULE 300. COURT TO RENDER JUDGMENT

Where a special verdict is rendered, or the conclusions of fact found by the judge are separately stated the court shall render judgment thereon unless set aside or a new trial is granted, or judgment is rendered notwithstanding verdict or jury finding under these rules.

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RULE 301. JUDGMENTS

The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors.

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MAR 2 2 1957

JOHN T. FEY, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. 190

EARL R. DEEN,

Petitioner,

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,

Respondent.

On Writ of Certiorari to the Court of Civil Appeals of Texas, Eleventh Supreme Judicial District at Eastland

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I. QUESTIONS PRESENTED BY RESPONDENT

The questions presented by respondent have been largely anticipated by petitioner in his Brief on the Merits. On pages 3-4 of its Brief, respondent enumerates five questions, which are in reality three broad questions and may be summarized as follows:

A. the respondent is entitled to judgment on the findings of the jury;

B. if not, the Court of Civil Appeals of Texas has so decided and this decision is binding on the Supreme Court of the United States;

C. if mistaken in above contentions, then at any rate the findings of the jury that the master did not furnish the servant proper tools, that such act was negligence and was the proximate cause of the servant's injuries, are not supported by the evidence.

In respondent's long Brief are many statements petitioner does not deem accurate and petitioner does not desire that any failure on his part to answer such statements should be construed as a confession of their accuracy. Under these circumstances, the Reply Brief cannot be as brief as petitioner would prefer. Repetition of matters already presented in the Brief on the Merits will be avoided so far as practicable. Respondent's points as summarized above will be discussed in order.

II. REPLY TO RESPONDENT'S POINTS

A. *Whether Respondent Is Entitled to Judgment on the Findings of the Jury.*

1. The pleadings and the evidence supporting all the findings of the jury and the judgment of the trial court rendered thereon have been fully discussed in Petitioner's Brief on the Merits. Deen's motive in bringing the case in the state court, rather than the federal court, as discussed on page 2 of Respondent's Brief, or whether Deen could have won the case on

a general charge in the federal court (Respondent's Brief, p. 61) are matters not disclosed by the Record and are speculations that will not assist this Court in deciding the great constitutional question of whether the Texas appellate courts have deprived this injured federal employee of his right of trial by jury. Respondent says the petitioner did not review the evidence showing the extent of his injuries. (Respondent's Brief, p. 20.) That question has not been raised in this court. If it is raised petitioner will reply thereto. The trial court properly charged the jury on loss of earnings and loss of earning capacity (R. 119). The jury assessed the damages according to the instruction of the court and in accordance with their findings on other issues. The record does not show that Deen is still working for the company (Respondent's Brief, p. 21) although it does show he was working for the respondent at the time of the trial, April 12, 1954, and was still handicapped because of his injury (R. 28).

2. Throughout his Brief, respondent has continually emphasized the jury found the railroad had furnished Deen a safe method to do his work. Casually, in glancing through Respondent's Brief, petitioner has found this statement or its equivalent made, at least, seventeen times. Respondent apparently believes repetition cures inaccuracy. On page 55 of his Brief respondent emphasizes this inaccuracy by placing it in italics and

by conveying the impression that petitioner has subscribed to its accuracy in these words:

> "The jury found on what petitioner admits was ample evidence, that the railroad company furnished Deen adequate help to do the work in reasonable safety."

A proper regard for the truth would require the respondent to state that that is his construction of the jury verdict, not that the jury so found, and not that petitioner has accepted such construction of the jury verdict. A summary of the jury findings are set out on pages 5 and 6 of Petitioner's Brief on the Merits. This summary is copied by respondent on pages 23 and 24 of his Brief and is admitted to be accurate. The findings themselves are in the Record, pages 114-118. The jury did not find that with adequate help Deen could do his job safely.

3. In an effort to explain away the jury verdict, the judgment of the trial court rendered in accordance with that verdict, decisions of the Honorable Supreme Court of the United States upholding verdicts and trial court judgments in cases with similar facts such as *Clyde Wilkerson v. Wilson McCarthy and Henry Swan, as Trustees of Denver & Rio Grande Western R. Co. (1040), reh. den., 93 L. Ed. 497, 336 U. S. 53, 69 S. Ct. 413,* and *Virginian Railway Co. v. Viars, 193 F. 2d 547;* and decisions of Texas appellate courts, as *Port Terminal Railroad Association v. Oliver Ross (1956), 289 S. W. 2d 220.* and *Galveston, H.*

& S. A. Ry. Co. v. Brewer (1928), 4 S. W. 2d 320, respondent has deemed it advisable to initiate the court into the intricacies of the Texas practice. Repondent reveals on page 63 of its Brief that both the pleadings and the evidence must support the findings of the jury. Respondent cites six cases in support of this proposition and says it is not citing more because it doubts if petitioner can find any to the contrary. Petitioner shares that doubt and is hardly in a position to present any authorities to the contrary since in his Brief on the Merits, petitioner attempted to show both the pleadings and the evidence supported the jury findings.

> "Not only the pleadings but also the evidence support the above jury findings." (Petitioner's Brief, p. 7.)

4. Nor does petitioner have any quarrel with the general principle of law stated on page 63 of Respondent's Brief that a judgment must conform to the pleadings, the proof, and the verdict. But petitioner does not agree that this means that a part of the pleadings or a part of the proof or a part of the verdict may be looked to in determining the correctness of a trial court's judgment and other parts disregarded. It is the duty of an appellate court to consider the pleadings, evidence and verdict in their entirety in determining their sufficiency to support a trial court's judgment. It is the duty of an appellate court to indulge every presumption in favor of the

correctness of the trial court's judgment, to construe the pleadings and the evidence liberally to uphold such judgment, and to give effect, if possible, to all findings of the jury on which such judgment rests.

5. Throughout its Brief in arguing that the jury found that the railroad furnished Deen a safe method to do his work, which the jury did not find, respondent ignores these fundamental principles, recognized not only in Texas but in all common law states and countries.

6. The argument that the railroad furnished Deen a safe method of doing his work, as presented by respondent, is based in part on the pleadings of the petitioner. This argument is that plaintiff's (petitioner's) pleading was that the railroad was negligent either in failing to furnish proper tools or in failing to furnish adequate help and since these acts of negligence were plead in the alternative the burden was on the plaintiff to prove both acts of negligence in order to recover. (Respondent's Brief, p. 43.) Such was the Court of Civil Appeals of Texas construction of petitioner's pleading. "Deen alleged it was defendant's duty to either furnish tools or sufficient help." (R. 190.) But such construction is based on a part only of the pleading. Such construction does not liberally construe the pleadings so as to uphold the verdict of the jury and the judgment of the trial court ren-

dered thereon. Such construction ignores another part of Petitioner's pleading:

> "That the injuries herein set forth resulting to the Plaintiff were the direct and proximate result, jointly and severally, of the negligent acts of the Defendant in the following respects:
>
> "A. That the Defendant was negligent in not notifying Plaintiff's foreman that the new melting pot was being sent to the roundhouse for installation, in order that said foreman would have had proper tools as herein described for the removing of said babbitt, or in the alternative having sufficient help, as herein mentioned, to remove said babbitt without the use of tools.
>
> "B. That the Defendant was negligent in not having the foreman present and proper supervision.
>
> "C. That the Defendant was negligent in not furnishing Plaintiff with proper tools, as herein described, to remove said babitt.
>
> "(fol. 7) D. That Defendant was negligent in not furnishing at least two additional men to assist Plaintiff in removing the babbitt from said pot." (R. 4.)

Isn't it significant that respondent on page 22 of its Brief, in presenting plaintiff's pleading on this point copies down to where plaintiff alleges that his injuries were the direct and proximate result, jointly and severally of the negligent acts of the defendant, replaces this all important allegation with three little asterisks, and then resumes his verbatim quotation? Petitioner can hardly censure respondent too harshly for this practice since the court of Civil Appeals of

Texas ignored this part of petitioner's pleading. Now isn't it true that plaintiff alleged that the carrier was under the duty to furnish proper tools to remove the babbitt or, in the alternative, to provide sufficient help, but that plaintiff also alleged that these two acts of negligence with other acts of negligence, jointly and severally, were the proximate causes of plaintiff's injuries? That is what the Supreme Court of Texas said petitioner pled in commenting on the Deen case in *Port Terminal Railroad Association v. Oliver Ross (1956), 289 S. W. 2d 220, 225:*

> "Petitioner alleged that the carrier was under the duty to furnish proper tools to remove the babbitt, or in the alternative to provide sufficient help to remove the babbitt without the use of tools, and that the railroad was negligent in failing to furnish proper tools and in failing to provide sufficient help."

No special exception was urged to plaintiff's pleading in the trial court on the ground it was ambiguous or inconsistent in pleading additional help and proper tools both in the alternative and as concurrent acts of negligence. It is true that respondent excepted to the allegation of proper tools because the allegation did not specify what tools (R. 7).

As pointed out in Petitioner's Brief on page 17, the case was submitted to the jury on a charge where the failure to furnish tools and the failure to furnish adequate help were each considered as concurrent

acts of negligence, each being a proximate cause of the injuries. The trial court rendered judgment on that theory.

7. As in construing and giving effect to the verdict of the jury, the respondent wishes this Court to consider only a part of plaintiff's pleading, so the respondent wishes the Court to consider only a part of the evidence. But here again the Court must consider all the evidence and construe it liberally in favor of the verdict of the jury and the judgment of the trial court rendered thereon. On page 7 of Respondent's Brief it says that petitioner has made no reference to evidence detailed in the opinion of the Court of Civil Appeals. To this petitioner pleads guilty. The petitioner does not accept the Court of Civil Appeals of Texas as a fact finding agency. For the facts, petitioner refers to the findings of the jury, and such implied findings made by the trial court in rendering judgment and in giving effect to all the findings of the jury. It is of no importance whether the Court of Civil Appeals of Texas has properly weighed conflicting evidence. It is important whether the evidence supports the findings of the jury and the implied findings of the trial court.

The undisputed evidence does not show that with adequate help, Deen could have performed his work safely. The evidence developed in the trial court by the respondent in its cross-examination of witnesses

Deen and Snow (Petitioner's Brief, p. 25) and the construction placed on the evidence by the respondent in the trial court (Petitioner's Brief, p. 24) certainly show that there was a conflict in the evidence as to whether with adequate help Deen could do the work safely. On page 12 of Respondent's Brief it charges petitioner with quoting Deen's testimony, that the accident would have happened if the whole shop had been there, out of context. In an effort to show what Deen really meant when he said that if the whole shop had been there handling the pot, it might have fallen on two of them (R. 63), respondent quotes at great length from the record (R. 62-63) on pages 12, 13, 14, 15 and 16 of its Brief. But as in the case of the pleading, respondent omitted from its quotation that part that was damaging to its construction of the pleading, so it omits from its quotation of the evidence that part that is damaging to its construction of the evidence. Pleadings in support of the jury's findings are concealed behind asterisks in Respondent's Brief. Evidence tending to show the manually handling of the pot, even with additional help, would be dangerous and was not a safe method, is concealed in Respondent's Brief behind these words:

> "Immediately following the last above quoted part, he (Deen) went on to point out that the fourth man would have been more in the way than a help. We pick up with his testimony again on page 64." (Respondent's Brief, p. 15.)

When petitioner turns to the Record, he finds concealed behind the above words in Respondent's Brief, the following additional evidence by Deen:

> "Cross-examination by respondent: And after you had gotten it up you think a third man or a fourth man could not have had anything to do with it falling out" and you answered: "No, sir." Then Question 178: "In your opinion it would fall out if six men were there?" Answer: "Just as apt to." Question 179: "And you don't know but what your leg would have been in exactly the same shape if there had been six men helping?" and you answered: "That's right." Now, was that your testimony in your deposition? A. "Yes, sir." Q. "Is it true?" A. "Yes, sir." (R. 64.)

Respondent does not charge the evidence quoted from the cross-examination of the witness, Snow, to the same effect is out of context (Petitioner's Brief, p. 24). Respondent has given no satisfactory explanation why it told the trial court "it is undisputed that as far as this accident itself is concerned, additional employees could not and would not have prevented this happening" (R. 121), and that there was no proximate cause issue for the jury on the railway failure to furnish additional help "for reason that under the undisputed evidence the failure to furnish one or more additional men was not and could not be a proximate cause of plaintiff's injuries" (R. 130), and why in this Court it contends that the jury findings that the defendant did not fail to furnish one or more additional men to plaintiff, other than Snow, to assist plaintiff in removing the babbitt from the

melting pot, that Deen was negligent in failing to obtain additional help, and such negligence was a proximate cause of his injuries, are the equivalent of being a finding by the jury that the railway company furnished adequate help to Deen to do the work involved with reasonable safety (Respondent's Brief, p. 38).

8. Respondent says on pages 16 and 54 of its Brief that petitioner has misconstrued the evidence developed by respondent on the cross-examination of Deen and Snow to the effect that the accident would have happened if additional help had been present and respondent's contention in the trial court that additional employees would not and could not have prevented this happening. Respondent says that all that it meant by this evidence and by these contentions were that if Deen was going to put his leg in the place where he knew the babbitt was going to fall, he was going to get his leg broken, whether the work was done by six men, by a lifting device or any other way (Respondent's Brief, p. 54). But even if this is true, we are concerned with the construction of the evidence which is for the jury and the construction of judicial admissions which should be construed in favor of the judgment of the trial court. Surely respondent will not contend that a jury verdict and the judgment of the trial court should be set aside on what respondent meant to say by his evidence and admissions rather than on what it did say. If this Court construes respondent's evi-

dence and admissions by what it says it meant rather than what it said, the conclusion is inescapable that in the trial court respondent's position was that Deen's injuries were due to his putting his leg in the way of the falling babbitt and in this Court respondent's position is that Deen's injuries were solely due to his failure to obtain additional help.

On conflicting evidence, which petitioner has not detailed because the findings of the jury in this connection have not been attacked, the jury found among other things:

(1) that Deen was not negligent in the manner and method he used in doing the work;

(2) that the sole proximate cause of Deen's injuries was not due to his own acts and conduct.

9. The petitioner did not plead that with additional help Deen could do his work safely. The undisputed evidence does not establish that the manual handling of the steel pot was a safe method, and the jury did not find that the railway provided Deen a safe method to do his job. The jury could have reasoned that if Deen had obtained additional help he would not have been injured but that the method of manually handling the heavy steel pot might nevertheless be dangerous to one of the workmen if they lost control of it and it unexpectedly fell backwards or forwards. Such was the reasoning of the Supreme Court of Texas on a similar point in a case where the facts are almost

identical with the Deen case [*Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220, 224*]:

> "The jury could have reasoned that if the plaintiff had obtained the help of another workman, he would not have been injured from the effort of tilting the drum, but that the method was nevertheless unsafe because either or both of the workmen might be injured if they lost control of the drum."

In considering the possibility of danger from the manual handling of the steel pot, with contents, the jury had before it a full description of the steel pot. It was about a yard long, ⅔rds of a yard wide, ⅓rd of a yard deep (R. 17), and with its contents weighed almost a half a ton (R. 18) and had a rim only 1½ to 2 inches wide, where it could be gripped (R. 19). It is not true that the undisputed evidence shows that the small, heavy, steel pot could be safely handled manually or that the company's furnishing of additional help, as found by the jury, provided a safe method of doing the work. The fact that the steel pot had been turned over manually before without mishap is not conclusive on the question whether this was a safe method of doing the work. In *Port Terminal Railroad Association v. Ross, 289 S. W. 2d 220, 222*, the Supreme Court of Texas upheld a jury verdict in favor of the injured employee even though the evidence showed the method of doing the job had been followed for about two months without mishap:

> "Throughout the period of some two months after the spigot was broken, plaintiff and Graham

were together whenever oil was poured from the drum. On each of these occasions, they tilted the drum together and poured the oil therefrom without mishap."

9. It is not true that the company furnished Deen only one method to do his job and the jury so found. Defendant pled it did not furnish any method at all for doing the work but left the selection of the method to Deen (R. 7). Defendant pled the selection of the method was solely by Deen and that there was no instruction or requirement by the company (R. 8). Defendant pled: "if there was any negligence in the method used, the equipment used, or the amount of help used, or the way and the manner in which the work was done, the Plaintiff himself was the man that chose all of same of his own volition, without any instruction or requirement from the Defendant, and if there be any negligence involved in any of the matters set out in this paragraph it was the (fol. 11) Plaintiff's negligence and proximately contributed to his injuries" (R. 8). That is a plea of contributory negligence. The jury found Deen guilty of contributory negligence. Respondent wants this Court to construe the jury's findings of contributory negligence as the sole act of negligence causing Deen's injuries. The jury found, among other things, that the railway company should have reasonably anticipated that the plaintiff would perform the work which caused his injuries in the way and manner in which he did (R. 118). The case was submitted to the jury both on

issues of the failure to furnish additional help and the failure to furnish proper tools. Construing the pleadings and the evidence in favor of the verdict of the jury and the judgment of the trial court, one must conclude additional help and proper tools were both necessary to make the method of work reasonably safe. While under the jury findings the railway did furnish additional help, under the same findings the railway did not furnish proper tools (R. 115). The job was not simply the removal of the babbitt from the pot. The job was the removal of the pot from the furnace, the transfer of the babbitt from the old pot to the new pot, and the placing of the new pot on the furnace. Under the findings of the jury, a combination of additional help and proper tools were necessary to do this job in safety. Such findings are in accord with the facts. On page 8 of Petitioner's Brief the customary method of handing the pot and emptying out the babbitt are described in these words:

> "The customary method of handling the extraction of solidified babbitt from the steel pot had been to lift the pot and babbitt off the furnace with the crane, as Deen did, place it on the floor, release the arms of the crane, get five or six men to come and turn the pot over manually, empty out the contracted babbitt, and then again attach the arms of the crane and hoist the pot back on the furnace."

On page 7 of Respondent's Brief it quotes the above as a correct statement of the facts in this particular. The customary method of handling the steel pot and

babbitt, as conceded by both parties, certainly does not show that the job was solely a man-handling one as respondent contends throughout its brief. Other facts in the record certainly indicate, and the jury could have so concluded, that it was impossible for manual labor alone to handle this job. Respondent in its Brief on page 6 quoting from Petitioner's Brief as a correct statement of the facts says:

> "The 250-pound steel pot, about a yard long, ⅔ of a yard wide, and ⅓ of a yard deep (R. 17) containing 650 to 700 pounds of babbitt, a total weight of almost half a ton, fitted so snugly in the furnace that it was necessary to pry its 1½ to 2 inch rim (R. 19) off the brick furnace a height of about an inch (R. 14) so as to allow the arms of the crane to grip it and lift it from the furnace (R. 14-15)."

Clearly it would be unrealistic to say this part of the job was a man-handling one. How could the men grip a steel pot with its contents weighing almost a half a ton that fitted so snugly into a brick furnace, when the pot's steel rim was only 1½ to 2 inches wide? Surely this part of the job was for a machine. The railway company furnished a machine to do it, a crane. Again quoting from Respondent's Brief, page 6:

> "A crane on a pole affixed to the concrete floor with a hoist was right beside the furnace for lifting heavy objects."

Of course, Deen used the crane to lift the pot from the furnace (Respondent's Brief, p. 6). That is the

reason the railway company put it there. That is the reason the jury said that the railway company should have reasonably anticipated that Deen would perform the work in the way and manner which he did (R. 118). The Record does show, contrary to respondent's contention (Respondent's Brief, p. 7), that there was urgency in Deen's getting his job done. (R. 59.) While the crane was provided by the railway company for handling the steel pot, its hooks had difficulty in gripping the 1½ to 2-inch rim. It slipped from the hooks and crashed to the concrete floor (Respondent's Brief, p. 6). Fortunately no one was hurt at that time. If a crane used to lift a half-ton object was so equipped that the object might unexpectedly drop at any time, couldn't it be reasonably anticipated that some one might be hurt by such occurrence? Is a crane that will not securely hold a heavy object in the air and will not overturn it to empty out its heavier contents when the object reaches the ground a proper tool for the job? The jury said it was not a proper tool (R. 115).

Petitioner says that the steel pot should have been so equipped that the crane, provided by the railway company to lift it on and off the furnace, could hold it securely while in the air and over-turn it when it reached the floor. This, of course, does not mean the jury's findings that Deen was negligent in not using available help and this was a proximate cause of his injuries should be disregarded. It simply means that

Deen's negligence in failing to obtain help was a proximate cause of his injuries and the railway's negligence in failing to provide proper tools was also a proximate cause. There may be more than one proximate cause:

30 B Tex. Jur., Sec. 44, p. 223:

> "On the contrary, there may be more than one proximate cause of injuries inflicted or damages done."

As this record is developed, it is not true that with proper tools, Deen would not need additional help, nor even with additional help he would not need proper tools. The jury could have concluded that manual labor alone could not have lifted a snugly fitting steel pot with contents weighing almost one-half a ton with a 1½ to 2-inch rim off a brick furnace, over-turn it, empty out its contents, and replace it snugly on the furnace, particularly when the railroad company had placed beside it a hoist for lifting heavy objects. On the other hand, the jury may have concluded that even with proper tools Deen would need additional help in transferring the 650 to 700-pound babbitt from the old pot to the new one once it had been emptied out on the floor. The jury may have concluded the handling of 650 to 700 pounds of babbitt by manual labor is a reasonably safe way to do it, whereas the manually handling of a steel pot, with its contents, weighing almost a half ton is not safe where the pot is only a yard long, the babbitt inside is not controlled and is apt to slough out suddenly and unexpectedly. The cus-

tomary and the correct method of doing the job which Deen had to do, was not manually but a combination of manual labor and proper tools. Both were necessary to make the method safe. That is what the jury said. That was the theory upon which the trial court rendered judgment.

B. *Whether the Supreme Court of the United States is bound by the Decision of the Court of Civil Appeals of Texas.*

1. Respondent next contends the construction by the Texas Court of Texas pleadings, Texas jury findings, in the light of the record, is binding upon the United States Supreme Court. But Deen is a federal employee, claiming federal rights under an Act of Congress. State courts under the guise of applying local procedural rules, cannot deprive a federal employee of substantive federal rights given him by the Congress under the Federal Employers Liability Act. This is the rule, as we understand it, as stated by the Supreme Court of the United States in *Garrett v. Moore-McCormack Company, 317 U. S. 239, 63 Supreme Court Reporter 246, 87 L. Ed. 239 (1942)*. In this decision, the Court stated that the Jones Act, which was there involved, is to have uniform application throughout the country, unaffected by local views of common law rules. In that decision, the Court also says that the Federal Employers Liability Act is also to be uniformly ap-

plied throughout the country. In the course of the opinion, Mr. Justice Black stated:

> "If by its practice the State Court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the State would not enforce, but would actually deny, federal rights which Congress, by providing alternate remedies, intended to make not less but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not long ago we sought to achieve this result with respect to enforcement in the federal Courts of rights created or governed by State law."

Where a federal employee has been deprived by the State Courts of a jury trial, given him by the Congress under the Federal Employers Liability Act, the United States Supreme Court has not hesitated to interfere, *Clyde Wilkerson v. Wilson McCarthy and Henry Swan, as Trustees of Denver & Rio Grande Western R. Co. (1949), reh. den., 93 L. Ed. 497, 336 U. S. 53, 69 S. Ct. 413; Ellis v. Union Pacific R. Co. (1947), 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572.* In the Ellis case, the United States Supreme Court says:

> "And that negligence must be 'in whole or in part' the cause of the injury. 45 U. S. C. Sec. 51, 45 U. S. C. A. Sec. 51; Brady v. Southern Railway Co., 320 U. S. 476, 484, 64 S. Ct. 232, 236, 88 L.

> Ed. 239. Whether those standards are satisfied is a federal question, the rights created being federal rights."

Irrespective of what the Supreme Court of Texas may have said in *Hopson v. Gulf Oil Corporation, 150 Tex. 1, 237 S. W. 2d 352*, or in *Socony Vacuum Oil Co. v. Aderhold, 150 Tex. 292, 240 S. W. 2d 751*, as quoted on pages 52 and 53 of Respondent's Brief, to the effect that cases tried in Texas Courts under the Jones Act or the Federal Employers Liability Act are governed by rules of Texas practice, by the time the Supreme Court of Texas had decided *Port Terminal Railroad Association v. Oliver Ross (1956), 289 S. W. 2d 220*, the Supreme Court of Texas had learned the correct rule and states it in almost identical language to that used by the United States Supreme Court in *Wilkerson v. Wilson McCarthy and Henry Swan*, supra. The Supreme Court of Texas now states the rule as shown in the *Ross* case, in these words:

> "(7) In an action under the Federal Employers Liability Act, the question of what constitutes negligence and the sufficiency of the evidence to raise that question for the jury is to be determined by the applicable federal decision."

C. *Whether Evidence is Sufficient to Support Jury Finding on Railroad's Failure to Furnish Proper Tools.*

The petitioner comes to respondent's final point that the evidence is not sufficient to support the jury finding that the railroad failed to furnish Deen proper tools. Evidence which petitioner believes fully sustains the jury findings

on the failure to furnish proper tools and that this was a proximate cause of Deen's injuries is set out on pages 9-10 and the argument based thereon appears on pages 20-23 of Petitioner's Brief. Deen and Snow said bolts or clamps should be attached to the pot so that it could be over-turned by the available crane. Both Deen and Snow were experts in these matters. The attorney for the railroad in cross-examining Deen developed his expertness:

> "Q. Now, getting back to getting that pot out, I think you had taken it out about three times before in the past two or three weeks, had you not?
>
> "A. Something like that.
>
> "Q. You knew how to handle that job, didn't you, Earl?
>
> "A. I thought I did.
>
> "Q. Was there anyone out there that knew more about it than you did, or who had taken out more times than you had?
>
> "A. No, sir.
>
> "Q. You were an experienced man, weren't you?
>
> "A. I thought I was." (R. 57.)

Snow was acting blacksmith and testified that if the steel pot had I-bolts fitted into it that it could safely be handled with the crane (R. 90). That he could have done this work in his shop (R. 90). That he had the torch and drill to cut the holes in the steel pot and that he could make the I-bolts (R. 92). But respondent says this method would be dangerous (Respondent's Brief, p. 72). If the railroad had any information as to the danger of such a method it

did not present it to the jury. As pointed out in Petitioner's Brief on the Merits, such silence is a circumstance to be considered against it. Petitioner cited *Texas and Pacific Ry. Co. v. Riley (1944) (Court of Civil Appeals of Texas, 183 S. W. 2d 991, writ of error refused by the Supreme Court of Texas. certiorari denied, 325 U. S. 873, 65 S. Ct. 1414, 89 L. Ed. 1991)*, in support of this proposition. Respondent, on page 72 of its Brief, says the above rule does not apply where defendant puts on no testimony at all.

> "Under such circumstances, no presumption exists, and appellee's authorities are inapplicable." (Respondent's Brief, p. 73.)

But in the *Riley* case, which decision was approved by the Supreme Court of Texas, cited in support of the rule that a party's silence has a certain probative force, the Court said at page 992:

> "At the conclusion of appellee's testimony appellant moved for an instructed verdict which was by the Court denied. Appellant offered no testimony."

Snow certainly did not testify the fastening of bolts to the pot so that it could be gripped by the hooks of the crane would be dangerous (R. 90). Certain parts of Deen's testimony are subject to the construction that he testified that the use of clamps on the steel pot would be dangerous. Because of Deen's innate honesty and lack of intelligence, he made some general admissions that a more wily and dishonest person would not have been led into. Of course, petitioner by that expression is not saying that if Deen had been willing to lie a stronger case could have been made as respondent attributes to petitioner on page 17 of

Respondent's Brief. What petitioner is saying is that Deen, by lack of intelligence and alertness, answered some vague, double barrelled questions, which he did not really understand, by some apparent general admissions, which he really did not intend to make, and which were not in accordance with the facts as reflected by the record as a whole. For example, consider the following evidence in response to questions by respondent's attorney:

> "Q. Question 191: 'You know of no device that would hold it?' (Pot) Answer: 'We had thingd to lift so it could not turn or roll, that is, so long as your hoist stuck so that you can get it turned over and get the babbitt out, but you are likely (fol. 112) to throw a piece of cast iron through it; it is dangerous' did you answer that?
>
> "A. Yes, sir.
>
> "Q. Is that true?
>
> "A. Yes, sir.
>
> "Q. Now, let's get back to the matter of clamps."

This testimony is quoted on page 69 of Respondent's Brief, except it omits the remark of respondent's attorney: "Q. Now, let's get back to the matter of clamps." What was Deen talking about when he said: "We had things to lift it so it could not turn or roll so long as your hoist stuck so that you can turn it over and get the babbitt out but you are likely to throw a piece of cast iron through it; it is dangerous?" When the attorney for respondent says immediately thereafter "now let's get back to the matter of clamps," doesn't that indicate Deen is not talking about clamps being dangerous? Now this evidence, in connection

with other evidence, which appears to be a general admission by Deen that clamps would be dangerous, is used as the basis for respondent's argument, page 72 of its Brief:

> "Of course, as he points out, the pot is cast iron, and when you clamp onto cast iron and lift, the probabilities are that the cast iron will fracture and the piece pull out or be thrown out."

Even if Deen did make a general admission that the clamps he proposed would be dangerous, such an admission would not be conclusive on the evidence. This point arose in *Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220, 223.* The Supreme Court of Texas in that case said:

> "Plaintiff testified that there would have been no accident if Washington or Graham had helped him, but this is an expression of opinion which cannot be given conclusive effect as a judicial admission."

In stating in its Brief that Deen admitted the use of clamps would be dangerous, respondent seizes upon certain general statements by Deen to this effect and completely ignores other parts of Deen's testimony and the testimony of other witnesses. For example, in addition to the testimony of Deen cited by respondent, tending to show the use of clamps were dangerous, respondent makes no reference to the following testimony of Deen:

> "Q. With reference to that equipment being dangerous; what equipment did you have reference to?
>
> "A. The deal—any deal would be dangerous without it was securely fastened and put on in such a way that it would be absolutely secure." (R. 83.)

In connection with the evidence of Deen and Snow that the pot should have been so equipped that the crane that lifted

it on and off the furnace could over-turn it and empty out its contents, petitioner again calls the Court's attention to *Galveston, H. & S. A. Ry. Co. v. Brewer (1928) (Court of Civil Appeals of Texas, writ of error refused), 4 S. W. 2d 320.* This decision was approved by the Supreme Court of Texas. The evidence both developed on direct examination and cross-examination set out in considerable detail is very similar to the testimony of Deen and Snow. The case involved a hoist and the plaintiff and his fellow workers suggested a simple device that would prevent stringers (timbers) from slipping and falling when being loaded on a flat car. Brewer was injured by being struck by a falling timber. Just as in the *Deen* case the railroad urged Deen should not have put his leg in the way of the falling babbitt, so in the *Brewer* case the railroad urged Brewer should not have placed himself in the way of the falling timber. Brewer and fellow employees testified as did Deen and Snow that the simple devices they recommended for making the method of doing their jobs safe, so far as they knew, were not in use and they had never seen them in use. The evidence in the *Brewer* case is much stronger in favor of the railroad than in the *Deen* case because the railroad offered evidence in the *Brewer* case that the hoisting machine and the apparatus connected therewith was scientifically constructed and the kind in general use for the purpose of hoisting heavy timbers and other materials. In the *Deen* case, the railroad said nothing. In the *Brewer* case the Court of Civil Appeals said, and the Supreme Court of Texas approved, that the jury was justified in

finding on such evidence that the railroad did not furnish Brewer proper appliances and this was the proximate cause of his injuries.

III. CONCLUSION

As respondent charges petitioner relies very heavily on

Clyde Wilkerson v. Wilson McCarthy and Henry Swan, as Trustees of Denver and Rio Grande Western R. Co. (1949), reh. den., 93 L. Ed. 497, 336 U. S. 53, 69 S. Ct. 413;

Virginian Railway Co. v. Viars, 193 F. 2d 547;

Port Terminal Railroad Association v. Oliver Ross (1956), 289 S. W. 2d 220; and

Galveston, H. & S. A. Ry. Co. v. Brewer (1928), 4 S. W. 2d 320.

The first is a decision by the United States Supreme Court. The second is a decision by the United States Court of Appeals, Fourth Circuit. The third is a decision by the Supreme Court of Texas. The fourth is a decision by the Court of Civil Appeals of Texas, approved by the Supreme Court of Texas. These four decisions are in complete harmony in holding that in master and servant cases, the jury decides conflicts in the evidence, draws inferences therefrom, passes on the credibility of witnesses, weighs the conflicting versions as to the cause of the accident and that an appellate court is not permitted to substitute its findings of fact for that of the jury. Respondent attempts to distinguish the *Wilkerson, Viars,* and *Brewer* cases, supra, from the *Deen* case on the ground that in the *Deen* case

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the jury found the master furnished Deen a reasonably safe way to do his work. This is not sound because the jury's findings construed as a whole means that proper tools and additional help were both necessary for Deen to do his job safely and while the railway provided Deen adequate help, it did not provide proper tools, and therefore Deen was not provided a safe method to do his job. Respondent makes no effort at all to distinguish the *Port Terminal Railroad Association* case, supra.

Petitioner prays that the judgment of the Court of Civil Appeals be reversed and the judgment of the trial court be affirmed as specifically heretofore set out in his Brief on the Merits.

Respectfully submitted,

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March 20th, 1957

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petitioner's Reply Brief has been mailed, on the 20th day of March, 1957, to the respondent's attorneys, as follows: to Messrs. Wigley, McLeod, Mills and Shirley, Attorneys at Law, Union Station Building, Galveston, Texas; to Messrs. Woodruff and Holloway, Attorneys at Law, First National Bank Building, Brownwood, Texas; and to Messrs. Hudson, Keltner and Sarsgard, Attorneys at Law, 1313 Continental Life Building, Fort Worth 2, Texas.

/s/ ROBERT LEE GUTHRIE

ROBERT LEE GUTHRIE

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Pacific R. Co., 352 U. S. 500; *Webb* v. *Illinois Central R. Co.*, 352 U. S. 512; *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521. The judgment of the Court of Civil Appeals is reversed and the case is remanded. MR. JUSTICE FRANKFURTER would dismiss the writ as improvidently granted. See his dissent in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 524. MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER dissent for the reasons given in MR. JUSTICE HARLAN'S opinion in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 559. MR. JUSTICE BURTON dissents. *Robert Lee Guthrie* argued the cause for petitioner. With him on the brief was *David C. McCord*. *Luther Hudson* argued the cause for respondent. With him on the brief was *Preston Shirley*. Reported below: 275 S. W. 2d 529.

Decisions Per Curiam.

No. 199. DEEN *v.* GULF, COLORADO & SANTA FE RAILWAY CO. Certiorari, 352 U. S. 820, to the Court of Civil Appeals of Texas, Eleventh Supreme Judicial District. Argued April 1, 1957. Decided April 8, 1957. *Per Curiam:* We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury. *Rogers* v. *Missouri*

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